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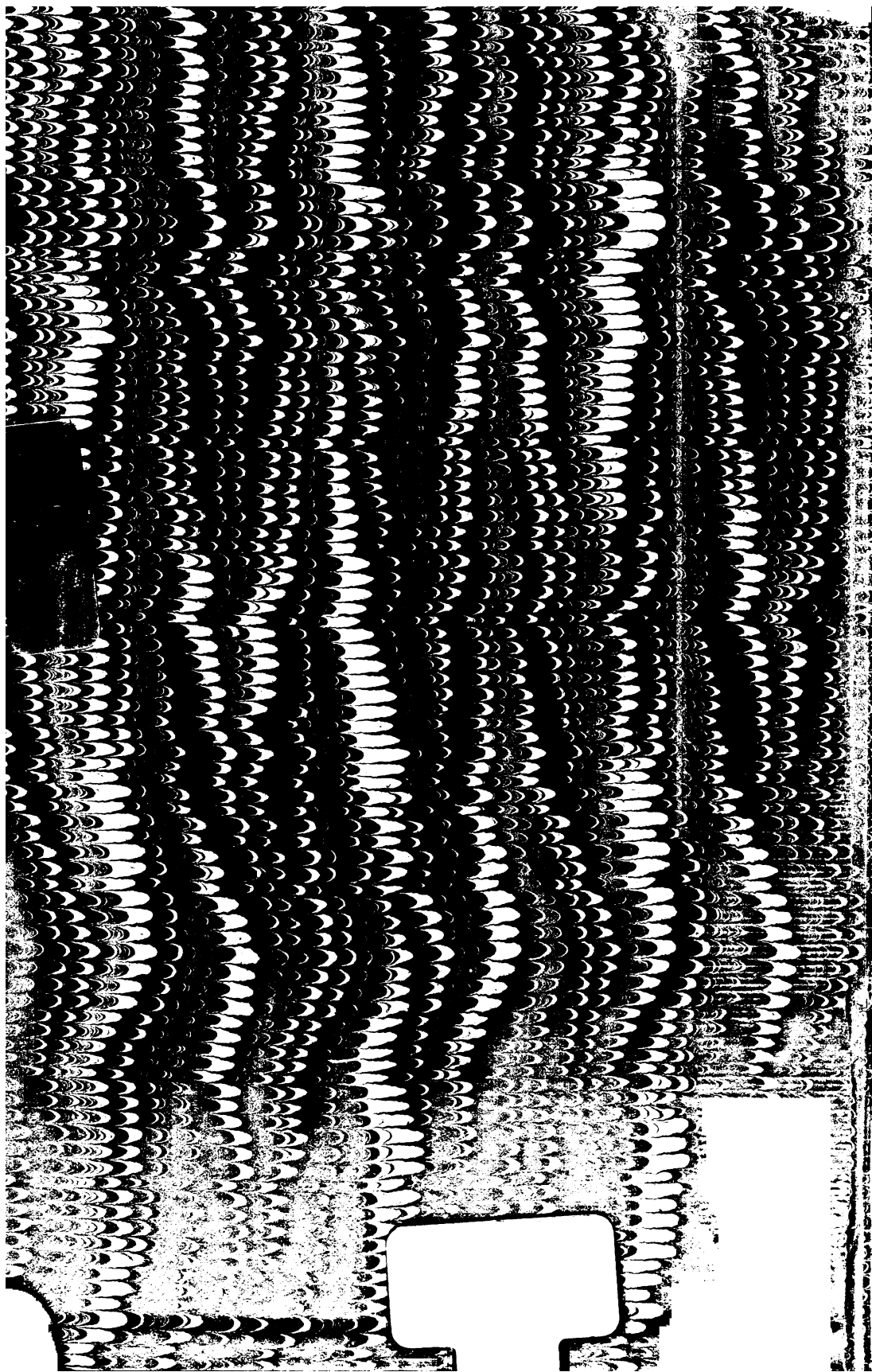
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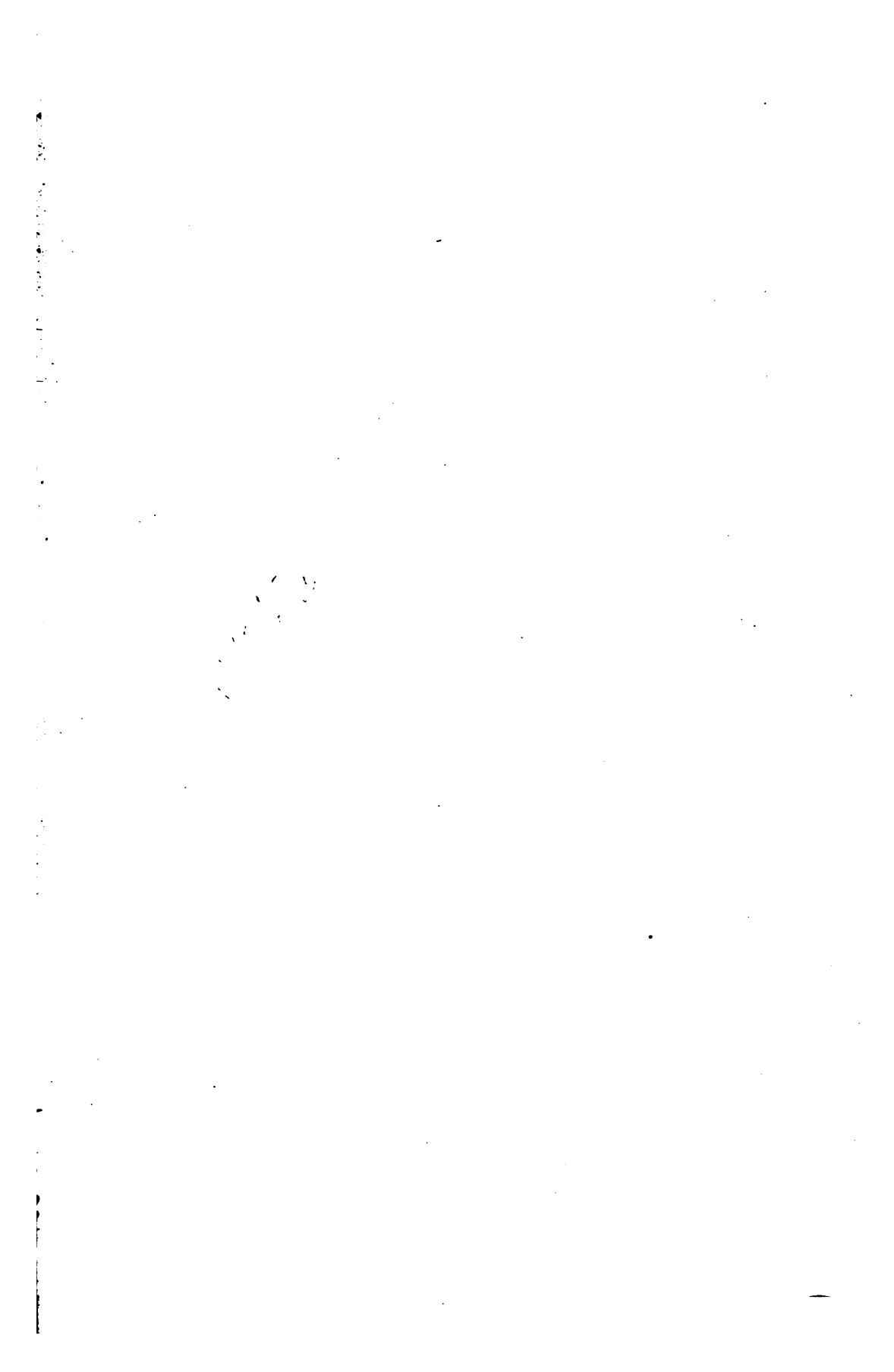
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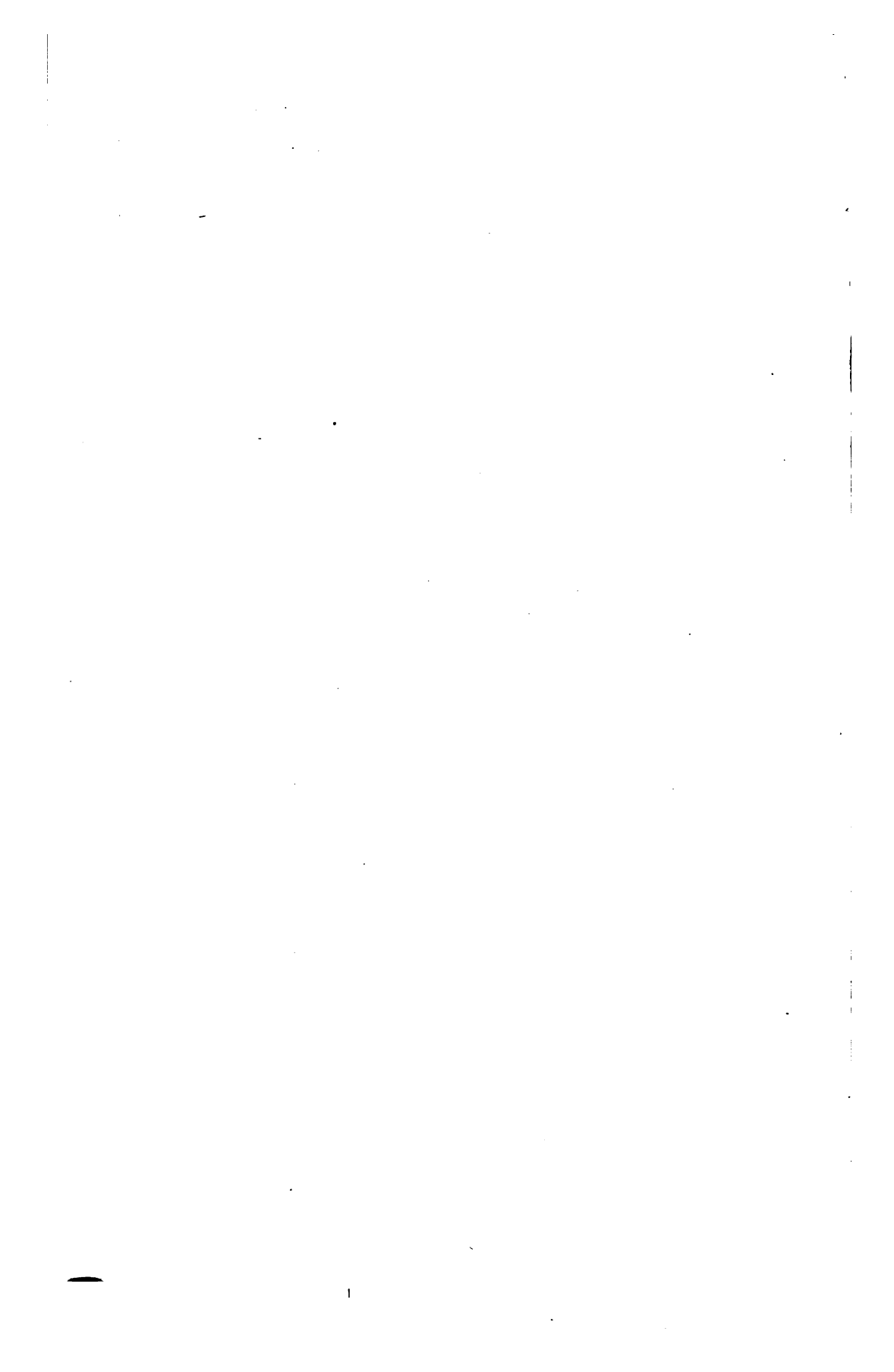




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BEFORE THE PERMANENT COURT OF ARBITRATION UNDER
THE HAGUE CONVENTION OF 1899.

THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS.

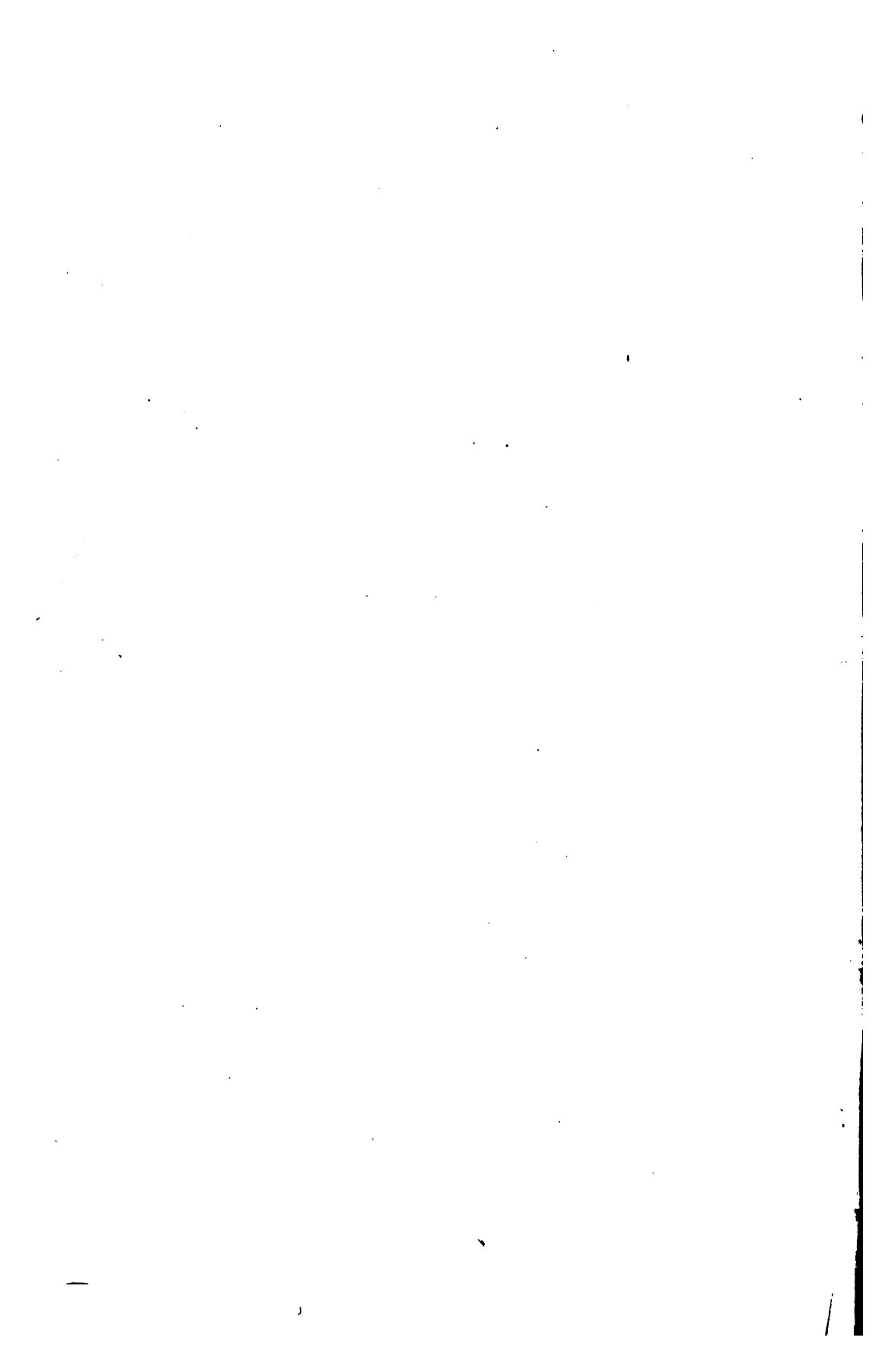
UNITED STATES OF AMERICA

v.

REPUBLIC OF MEXICO.

STATEMENT AND BRIEF ON BEHALF OF
THE UNITED STATES.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1902.



And under common law arbitration is not required to be made a judgment of any court. This binding between the parties until set aside. *Sheffield v. Clark*, 73 Ga 92, cited note p. 795, Vol. 2 Casey. Title A. & A.

Creation of Church in a country officially Catholic constituted a corporation; as institution of Bishop of California was equivalent to creating a corporation in another country. See *Scaps* *Refrigerio*, Par. 126, p. 395 of Transcript.

Matters deemed in issue even though not urged or considered on appeal - *Chand*, p. 105

Law June 23, 1856. Art. 3, recognizes religious communities as corporations

BEFORE THE PERMANENT COURT OF ARBITRATION,
UNDER THE HAGUE CONVENTION OF 1899.

THE PIOUS FUND CASE.

UNITED STATES OF AMERICA v. THE REPUBLIC OF
MEXICO.

STATEMENT AND BRIEF ON BEHALF OF THE UNITED
STATES.

(The present case comes) before this honorable tribunal (through joint reference) to it (by the United States and Mexico under the terms of what is known as the The Hague Convention) except in so far as the provisions of such convention may have been departed from by the express language of the protocol.

The matter at issue has relation to what is known as the Pious Fund of the Californias, the history of which, as well as the history of all prior litigation relating thereto, will hereafter be related. For the moment it is sufficient to say that some, and, as the United States contends, practically all, of the matters at issue were formerly passed upon by what was known as the American and Mexican Mixed Claims Commission, established under the terms of a convention entered into between the United States and Mexico in 1868, and the final ratifications of which were exchanged at Washington February 1, 1869, and that (by the terms of the protocol under which this tribunal acts it has power to decide—

(1) If said claim, as a consequence of the former decision, is within the governing principle of *res judicata*; and

(2) If not, whether the same be just;

And to render such judgment and award as may be meet and proper under all the circumstances of the case.

With these preliminary remarks, we may proceed to the consideration of the case from the point of view of the complaining Government.

JUDICIAL HISTORY OF THE PIOUS FUND CONTROVERSY BETWEEN THE
TWO NATIONS.

(The Pious Fund case was first brought to the attention of the American Government through a letter addressed by Mr. John T. Doyle, on behalf of the bishops of California, to the Hon. Lewis Cass, Secretary of State of the United States, which letter was dated July 20, 1859, and is to be found on page 5 of the transcript of record. This letter asked for the "enforcement of" the rights of the bishops "against the Government of Mexico," stated briefly the facts in the case, and requested the interposition of the Government. No steps seem to have been taken based upon this letter.

(Later, differences arising between the two countries because of grievances complained of by the citizens of each country against the other, a convention was agreed upon between the United States and Mexico, this convention being concluded July 4, 1868, and ratifications exchanged February 1, 1869.) By virtue of its terms, the first session of the Commission thereunder took place in Washington July 31, 1869. Subsequent agreements between the two countries extending the operations of the tribunal so created are summed up elsewhere in this brief. (Within eight months after the first meeting provided for, and on March 30, 1870, the bishops of California, by Mr. Eugene Casserly, again made the State Department acquainted with the fact that they were the owners of a large claim against Mexico, his letter being found on page 8 of the transcript.) The letter was followed by a memorial, complete in all particulars, and filed before the arbitrators December 31, 1870 (Transcript, p. 9). A large amount of evidence was filed with the memorial, and, apparently assuming that all the evidence on behalf of the claimants was in, Mr. Cushing on April 24, 1871, filed a motion to dismiss for the following reasons (Transcript, p. 67):

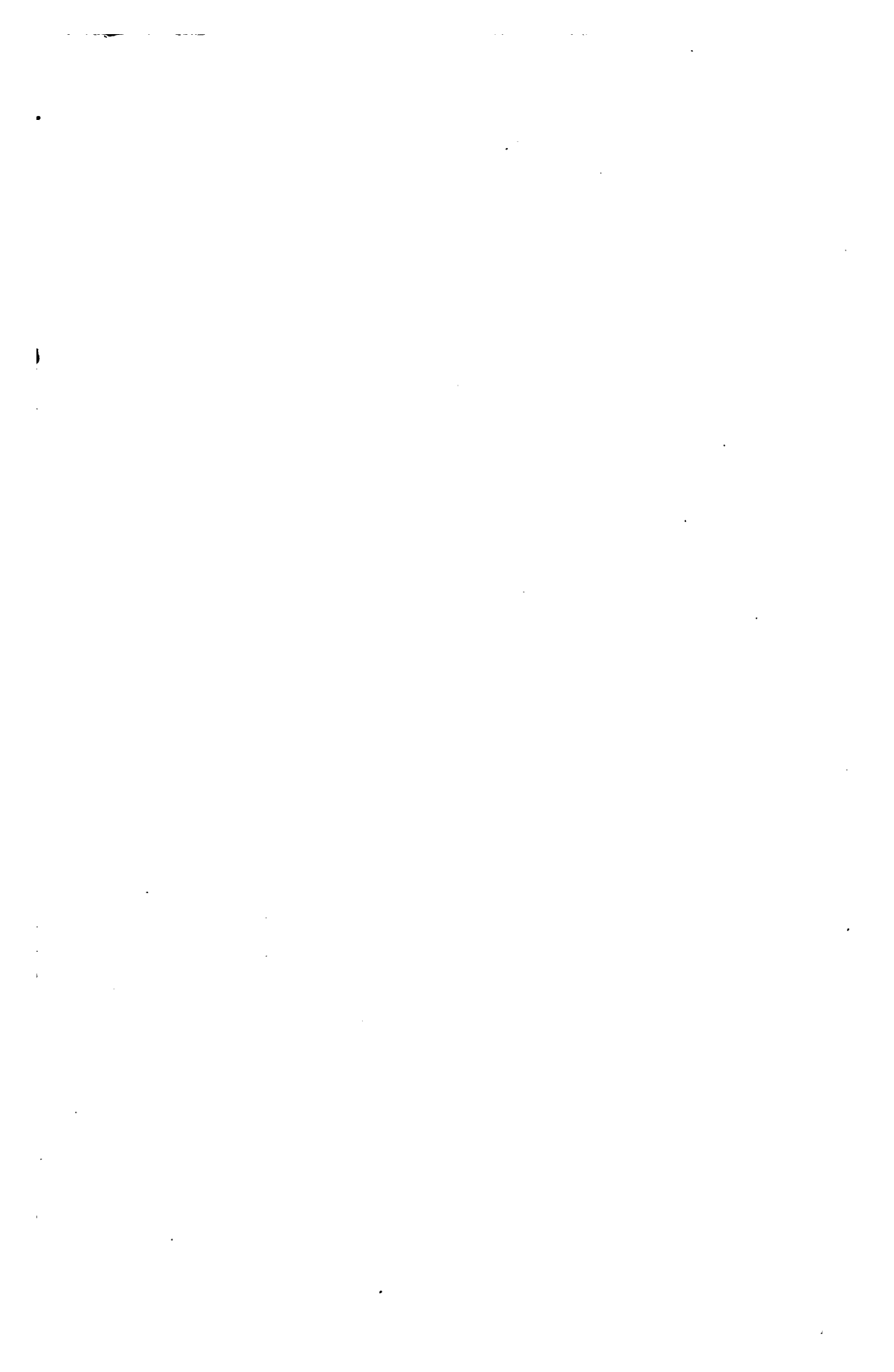
(1) Because the act of incorporation of the petitioners as corporation sole did not authorize them to claim property beyond the limits of the State of California.

(2) Because the petitioners show no legal interest in or title to the "Pious Fund" in controversy.

(3) Because the petitioners had a legal remedy in the Mexican courts which they were bound to pursue and exhaust before coming here.

(4) Because the injuries complained of were done before February 8, 1848, and this Commission has no jurisdiction of the claim.

In his brief accompanying said motion Mr. Cushing discussed at length the evidence already before the Commission, insisting that it was insufficient to make a case of which that body should take cognizance, as well as that the petitioners were without legal right for the reasons above indicated. Briefs were filed in reply, followed by



additional evidence on behalf of the complainants, and succeeded by a brief with extensive evidence relating to the facts of the case furnished by the Mexican Government.

(The case, therefore, being fully placed before the court on both the law and the facts, was considered by the arbitrators; the American arbitrator finding on behalf of the complainants for \$904,700.99 and the Mexican arbitrator finding for the defendant.)

The case thereupon went to the umpire, and before him extended arguments were filed on behalf of the parties in interest: John T. Doyle (Transcript, p. 557); Nathaniel Wilson and P. Phillips (Transcript, p. 575), and Eugene Casserly (Transcript, p. 594) all presenting briefs, and Sr. Eleuterio Avila, on behalf of the Mexican Government (Transcript, p. 546) presenting an exhaustive argument. (After having considered the case, the umpire, Sir Edward Thornton, on November 11, 1875, awarded against Mexico and in favor of the claimants the sum of \$904,700.99 in Mexican gold) (p. 606).

On January 29, 1876, the agent for Mexico filed a motion for rehearing, supported by a lengthy argument (pp. 615-647). This motion was, on November 18, 1876, denied by the umpire (p. 647), although on the same day, by a further order, he made a correction of an error in computation to which his attention had been called (p. 650).

The award was duly paid by Mexico in conformity with the terms of the several conventions, although some correspondence ensued with reference thereto, which correspondence is to be found in the latter part of Diplomatic Correspondence. By a letter on pages 77 and 78 of Diplomatic Correspondence the Mexican secretary of foreign affairs declared that:

Though the final award in the case (Pious Fund) only refers to interest accrued in a fixed period, said claim should be considered as finally settled *in toto*, and any other fresh claim in regard to the capital of said fund or its interest accrued or to accrue as forever inadmissible.

To this, Secretary Fish, under date of December 4, 1876 (Diplomatic Correspondence, p. 79), replied, among other things, as follows:

I must decline, however, to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award.

In his reply in turn to the foregoing, Señor Mariscal (Diplomatic Correspondence, p. 80) said:

It is not my intention, nor the intention of Señor Avila, to open any question whatever, nor to put in doubt the final and conclusive character of the above-mentioned award. (Pious Fund.) * * *

In a further letter Señor Villarta (Diplomatic Correspondence, p. 81) replied at length.

After the letter last mentioned no further correspondence with relation to the Pious Fund took place between the two countries until the letter of Mr. Ryan to Señor Mariscal, dated August 17, 1891 (Diplomatic Correspondence, p. 8).

From the date last named until the signing of the protocol by virtue of which this court is convened, the correspondence between the two countries was quite active, leading up finally to the making of the present arrangements.

DATES OF CONVENTION OF 1868 AND SUPPLEMENTS THERETO WITH
RELATION TO THE SITUATION OF THE "PIOUS FUND" CASE.

Ratifications of the convention of 1868 were exchanged at Washington February 1, 1869. The first meeting of the arbitrators under this convention took place on the last day of the six months allowed therefor—that is, on July 31, 1869. This convention provided, Section III, that every case should be examined and decided within two years and six months from the date last mentioned—that is to say, the proceedings under the convention were to terminate January 31, 1872.

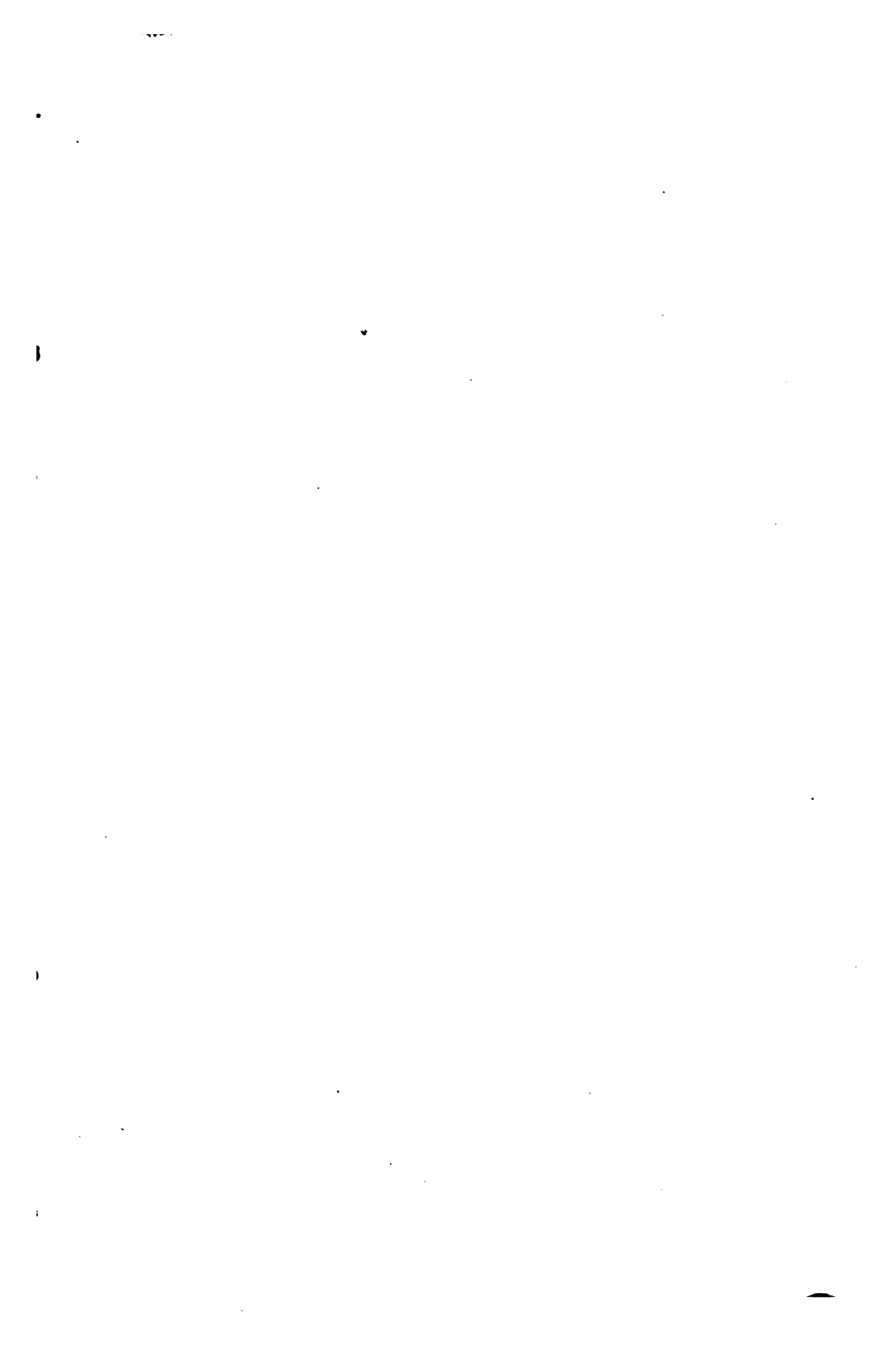
The Pious Fund case was referred to the commission August 13, 1869; statement filed March 31, 1870; memorial filed December 31, 1870, and on January 31, 1872, the cause was pending on motion to dismiss, filed by Mr. Cushing on April 24, 1871.

A convention providing for the extension of the time within which the joint commission should settle claims was signed between the two countries April 19, 1871, and ratifications exchanged February 8, 1872, eight days after the original convention had expired by limitation. This extended the first commission for not exceeding one year from January 31, 1872, or, in other words, to January 31, 1873.

On January 31, 1873, motion to dismiss, filed by Mr. Cushing, was still pending and undetermined, although on March 1, 1872, a reply thereto had been filed.

On November 27, 1872, a further convention was concluded, reviving and extending the duration of the joint commission for a period not exceeding two years from the day on which the functions of the commission would have terminated according to the convention of April 19, 1871. In other words, the commission was extended until January 31, 1875. Ratifications of this convention were exchanged July 17, 1873, nearly six months after the commission had expired by virtue of the convention of April 19, 1871, and it was proclaimed July 24, 1873.

At the time of the expiration of the functions of the commission by the convention signed April 27, 1872, and ratified July 17, 1873, to wit, on January 31, 1875, final argument for the claimants and an exhibit attached thereto had been offered by the agent of the United States (January 25, 1875).



By further convention concluded November 20, 1874, ratifications of which were exchanged January 28, 1875, and proclamation issued January 29, 1875, the functions of the commission were extended until January 31, 1876.

At the time the last extension went into effect, the Pious Fund case was still pending and undetermined, the difference in opinion being announced May 19, 1875, and arguments on behalf of Mexico and the United States being submitted respectively on July 10 and July 19, 1875, the award by the umpire being made November 11, 1875.

By convention entered into April 29, 1876, and ratifications exchanged June 29, 1876, the umpire was allowed until November 20, 1876, for the performance of his duties, he having been allowed by the treaty concluded November 20, 1874, to conclude his reports by July 31, 1876.

On January 31, 1876, the motion of the agent for rehearing was pending and undetermined, the same having been filed on January 29, 1876. On November 18, 1876, this motion was denied, although on the same day an arithmetical error was corrected by the umpire.

STATEMENT OF FACTS.

(The circumstances out of which grew the formation of what became known as "The Pious Fund" date back to the close of the seventeenth century. In the year 1697 Fathers Juan Maria Salvatierra and Eusebio Francisco Kino (or Quino), members of the Order of Jesus, presented a memorial to the King of Spain asking permission to undertake the conversion of the heathen of California, and that monarch recognizing the fact that prior expenditures on the part of the royal treasury for the purpose of obtaining the subjugation of California had proven a failure, and that it was not proper to expend additional public property to make new conquests in that neighborhood, and that the fathers had by their own exertion succeeded in converting more than 5,000 unbelievers, and that their missions and conversions were to be undertaken upon the charitable contributions which the Christian zeal of certain persons had offered to supply therefor, acceded to their prayers until he could decide further what might be his pleasure in the premises. This was, however, upon the condition that the reverend fathers should not have power, without order from him, to draw against or from the royal revenues for such "conquests." He further provided that all that might be conquered should be taken possession of in his name, and that the fathers should have absolute control of the expedition, with the right to arm soldiers for their protection. Addition No. 1. (Transcript, pp. 254, 401.)

(The reverend fathers collected considerable sums of money for the purposes of their expedition, having obtained prior leave therefor from their superiors, and in the latter part of October, 1697, they landed at the little harbor of San Dionysio, constructed "a small

entrenchment, in the middle of which they erected a tent as temporary chapel and in front of it planted a cross crowned with flowers," and thereafter, on October 25, took possession of the country in the name of the King. For some time the whole expenses of the missions founded by the reverend fathers referred to and their successors and all the soldiers and sailors employed were defrayed from the charitable contributions which formed the nucleus of the Pious Fund. Later, however, the missionaries appealed to the King, and he consented to take upon himself the expense of the soldiers and sailors employed and to allow the missionaries for their personal support the same modest stipend of \$200 per year which he granted through the rest of the viceroyalty. (Venegas, vol. 2, p. 58.) Even as late as 1734 we find that the missions occasioned no expense to the royal treasury, and no money had been furnished the missionaries as salary or stipend. (Transcript, p. 438.)

Down to 1731 the total of contributions for the development of the missions of California was \$120,000. (Noticias de la Provincia de Californias, Carta 2^a, p. 48.) It is supposed, however, that by judicious investments this amount had been somewhat augmented.

On June 8, 1735, was created a donation evidenced in writing, and which has generally been regarded as the foundation deed of the Pious Fund. We refer to the deed from the Marquis de Villapiente and his wife Marquesa de las Torres De Rada, found in the record in English at pages 104 and 452, and in Spanish at pages 99 and 309. The essential portions of this instrument should be quoted somewhat at length. It recites among other things the desires of the donors to labor—

To the utmost for His holy service and the glory of His most holy name, and to use all our power and faculties to cause Him to be known and adored as the true God, which He is, and Creator of all things, visible and invisible; and whereas the Reverend Society of Jesus, with its well-known religious zeal, has been heretofore employed and steadily engaged in the conversion of the heathen natives of the Californias, and its members, by preaching and instruction, have drawn into the fold of our holy Catholic faith great numbers of those barbarous people to whom they have devoted and are devoting themselves according to their institute, sacrificing their lives and exposing themselves to contumely from the heathens, solely for the greater glory of our Lord God; and whereas in the propagation of His holy faith (which at the sacrifice of so much labor they have established), and in order also that the many other tribes which are now at the doors of the church, as well as those remaining yet undiscovered, may not be deprived of the same advantages, they need human aid as a means of successfully prosecuting their labors.

The deed then continues with recitals of the source of title, indicates that the value of one-half of the premises conveyed is \$204,000,

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and conveys "to the missions of the Society of Jesus founded, and which in aftertimes the said society may found in said Californias" the estate known as San Pedro de Ibarra, with the annexed estate known as Ricon de Ibarra, with the buildings and appurtenances, supplies, and cattle and other animals, etc., and also a tract of land called San Antonio de los Llaños, a second tract situate at Los Alamos, and a third tract in the jurisdiction of San Pedro Guadalcazar. The total areas of the land so conveyed were estimated to exceed considerably 450,000 acres.

The trusts upon which said properties were to be held by the donees were as follows:

To have and to hold, to said missions founded, and which hereafter may be founded in the Californias, as well as for the maintenance of their religious, and to provide for the ornament and decent support of divine worship, as also to aid the native converts and catechumens with food and clothing, according to the custom of that country, so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessities, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the Father Superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support; and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. And by this deed of gift we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us, or which from any other cause, title, or reason may belong, appertain to us; and we cede, renounce, and transfer the whole thereof to

said reverend Society of Jesus, its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.

(This donation was accepted by the Society of Jesuits.) (Transcript, p. 108.)

We have already adverted to the fact that before the making of this deed a number of contributions had been received by the Jesuits, generally for the purpose of providing for particular missions, and we have mentioned their aggregate. Such detailed list as we are able to call to the attention of this tribunal is to be found on page 202 of the transcript, being an extract from the work entitled "Documentos para la Historia de Mexico." Shortly after the deed referred to, we find on page 203 of the transcript that the Marquis de Villapiente founded (in 1746) an eleventh mission with the sum of \$10,000, and that in 1747 Doña María de Borja, Duquesa De Gandia, by her will, furnished the missions with a very substantial contribution of \$62,000, which, after the falling in of annuities left servants, was increased to over \$120,000. (Transcript, p. 198.) During all of the years indicated and the following years the work of the Jesuits, or those who succeeded to them, steadily progressed; the missions ultimately established in Upper and Lower California being indicated on pages 150, 270, and 418 of the transcript.

In the year 1767 a royal decree was passed directing the banishment of the Jesuits and the taking possession of their temporalities by the Government (Transcript, pp. 262 and 410), and in 1773 another decree enforcing the same (Transcript, pp. 266 and 410). The order itself was abolished by the papal decree dated July 21, 1773 (Transcript, pp. 323 and 461). Three of the missions which had been established were suppressed, and after some royal decrees covering the matter (pp. 426, 278) the missions of northern California were established by the Franciscans, being supported, as is said (Transcript, pp. 272 and 420), "out of the enormous Pious fund acquired by the Jesuit fathers."

After the missions of California and the other missions of the Jesuits had been taken charge of by the orders of the King, he declared (Transcript, p. 456) that he had "subrogated in my royal person all the rights of patronage, which belonged to the regulars of the said order, and also those which they might possess in common with those other orders, without prejudice to these being devoted to the same purpose which they were before the time of the expulsion."

Shortly after this time the Pious fund received the benefit of

another large contribution, being from the estate of Doña Josefa Paula de Arguelles, a full account of which appears on pages 458 to 460 of the transcript. The court finally adjudged in 1784 that after deducting \$10,000 for one special purpose, and one-fourth going to the heir-at-law of Mrs. Arguelles because of the failure of one legacy, the remaining three-fourths should be devoted "to the conversion of the infidels in this kingdom and in the Philippines, half and half, at the disposal of the King." The estate left by her in Mexico consisted of several haciendas and pieces of city property, and to this fact we shall have occasion hereafter to refer. The King directed investment of the estate on the security of good real estate at 5 per cent interest for the purpose of employing the proceeds in the maintenance and increase of the missions of the Californias (Transcript, pp. 317 and 477). After the revolution, by virtue of which Mexico threw off the power of Spain, the Mexican Government assumed the administration of the Pious Fund; the first law with relation thereto being passed on May 25, 1832 (Transcript, p. 579), and reading in English and Spanish as follows:

MAYO 25 DE 1832.—LEY: *Que el gobierno proceda al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias.*

ART. 1. El gobierno procederá al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias, por término que no pase de siete años.

2. Estos arrendamientos se contratarán precisamente en pública subasta, en las capitales de los Estados ó Territorios, ó en la ciudad Federal, segun la ubicacion de las fincas.

3. Estos arrendamientos se sacarán al pregon dentro de tres meses de la fecha de este decreto, por treinta días, y á lo ménos con el mismo término se anunciarán por rotulones en la ciudad Federal, en las capitales de los Estados y Territorios, en las cabeceras de los Partidos, Departamentos ó Cantones en que se hallen ubicadas las fincas, y en los demas lugares que tuviere á bien el gobierno; y estos anuncios se insertarán á lo ménos en un periódico de la ciudad Federal.

4. Se sacarán tambien al pregon dentro de tres meses de concluido cualquier arrendamiento, ó cada seis meses si no hubiere arrendatario.

5. La aprobacion del remate de arrendamiento se hará prévia la del gobierno, á cuyo efectose le remitirá el expediente dentro de quince días de verificado aquel.

6. Los productos de estos bienes se depositarán en la casa de moneda de la ciudad Federal, para destinarlos única y precisamente á las misiones de Californias.

7. Lo directivo y económico de estos bienes, así por lo tocante á su administracion, como para conservar é invertir sus productos, estará á cargo de una junta dependiente del gobierno por la Secretaría del despacho de Relaciones.

8. Esta junta se compondrá de tres individuos, uno de ellos eclesiástico, nombrados por el gobierno, que se renovarán

saliendo uno cada año, comenzando por el último, y podrán ser continuados.

9. Esta junta tendrá un secretario, con la dotacion de 600 pesos anuales, pagaderos de los fondos de que se trata.

10. Las atribuciones de la junta serán:

Primera. Cuidar de que se arrienden con oportunidad las fincas rústicas y urbanas, pertenecientes al fondo piadoso de que se trata.

Segunda. Proponer al gobierno las condiciones con que hayan de hacerse los arrendamientos, y la cantidad á que por lo ménos deberá ascender la renta de cada finca.

Tercera. Examinar los expedientes de los remates, y consultar al gobierno si es de aprobarse el arrendamiento, ó si las propuestas hechas por algun otro licitante son mas ventajosas.

Cuarta. Proponer al gobierno el número de individuos que juzgue absolutamente necesarios para la administracion de las fincas rústicas, cuando no puedan arrendarse por falta de postores.

Quinta. Proponer el sueldo de los administradores, y la cantidad con que cada uno haya de caucionar su manejo.

Sexta. Cuidar de que los arrendatarios ó administradores presenten la informacion de idoneidad de sus respectivos fiadores, y la certificacion de supervivencia.

Sétima. Presentar á la contaduría general de propios, la cuenta general de los productos de los bienes del fondo piadoso, acompañando las de los administradores cuando los haya, á cuyo efecto las exigirá de éstos con la oportunidad necesaria.

Octavo. Cuidar de que los arrendatarios y los administradores, á su vez, verifiquen á su debido tiempo los enteros en la casa de moneda.

Novena. Proponer al gobierno las cantidades que puedan remitirse á cada una de las Californias, segun sus respectivos gastos, y la existencia que haya de caudales.

11. El secretario llevará un libro de actas de la junta, otro de los caudales que entraren en depósito en la casa de moneda, cuyas partidas se comprobarán con los recibos que expida el superintendente de ella, y otro de las cantidades que se libren contra éste. Todas las partidas, sean de cargo ó data, á la casa de moneda, las firmarán los individuos de la junta.

12. El superintendente de la casa de moneda se abonará el 1 por ciento de premio sobre las cantidades que recibiere en depósito, será responsable de éstas, y solo se le pasarán en data pagos que hiciere en virtud de libramiento firmado por los individuos de la junta, autorizado por el secretario de ella, y con el dese del secretario del despacho de relaciones.

13. La junta, dentro de los tres meses siguientes á su instalacion, formará su reglamento interior, y lo pasará á la aprobacion del gobierno.

(Se circuló por la Secretaria de relaciones en dicho dia 25, y se publicó en bando del 1° de Junio.)

[Translation.]

MAY 25, 1832.—Law: *That the Government proceed with the lease of the rural property belonging to the Pious Fund of the Californias.*

ARTICLE 1. The Government shall proceed with the lease of the rural property belonging to the Pious Fund of the Californias, for a term which shall not exceed seven years.

2. These leases shall be contracted by public sale, in the capitals of the States or Territories or in the Federal city, according to the location of the property.

3. These leases shall be announced by the public crier within three months of the date of this decree during thirty days, and at least for the same period shall be announced by printed notices in the Federal city, in the capitals of the States and Territories, and in the principal places of the districts, departments or cantons in which the property may be situate, and in such other places as the Government may deem expedient, and these announcements shall be inserted at least in one newspaper of the Federal city.

4. There shall be also announced by public crier within three months the conclusion of any lease whatsoever, or every six months if there should be no lease.

5. The approval of the letting of the lease shall be effected upon the sanction of the Government, to which the papers in the case shall be submitted for the purpose within fifteen days of the making of the lease.

6. The proceeds of such property shall be deposited in the mint of the Federal city, to be solely and exclusively destined for the missions of the Californias.

7. The disposal and management of such property, as well as matters relative to their administration, such as converting or disposing of its proceeds, shall be in the charge of a board, depending on the Government through the office of the secretary of foreign affairs.

8. This board shall consist of three persons, one of them an ecclesiastic, appointed by the Government, who shall be renewed by the retirement of one each year, commencing with the last, and who may be continued in office.

9. This board will have a secretary, with a compensation of 600 pesos per annum, payable from the funds in question.

10. The powers of the board shall be as follows:

First. To see that the rural and city property belonging to the Pious Fund in question be suitably leased.

Second. To submit to the Government the terms under which the leases are to be made and the minimum rental for each piece of property.

Third. To examine the papers relative to the letting of the leases, and to consult with the Government as to the approval of the leases, or whether the propositions made by some other applicant are more advantageous.

Fourth. To submit to the Government the number of persons that it deems absolutely necessary for the administration of the rural property, when the said property can not be leased for want of bidders.

Fifth. To submit the amount of the compensation of the administrators and of the bond with which each must guarantee his management.

Sixth. To see to it that the lessees or administrators submit information as to the qualifications of their respective sureties and the certification of survivorship.

Seventh. To lay before the auditor-general a general account of the proceeds of the property of the Pious Fund accompanying those of the administrators, if any, for which purpose said accounts shall be demanded of such administrators in good time.

Eighth. To see to it that the lessees and administrators on their part shall turn into the mint in due time moneys due by them.

Ninth. To name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and their available funds.

11. The secretary shall keep a journal of the proceedings of the board, a book of moneys deposited in the mint, the entries whereof shall be supported by the vouchers delivered by the superintendent of said mint, and another book of the amounts that may be drawn from the same. All the entries, whether of debit or credit, in the mint shall be signed by the members of the board.

12. The superintendent of the mint shall receive 1 per cent premium on the amounts that may be deposited with him, shall be responsible for the same, and such payments only shall be credited to him as he may make under warrants signed by the members of the board, authorized by the secretary of the said board, and with the visé of the secretary of foreign affairs.

13. The board shall within three months after its organization frame its internal regulations and submit the same to the approval of the Government.

(Was published by the department of foreign affairs on the said 25th day, and promulgated by proclamation on the 1st of June.)

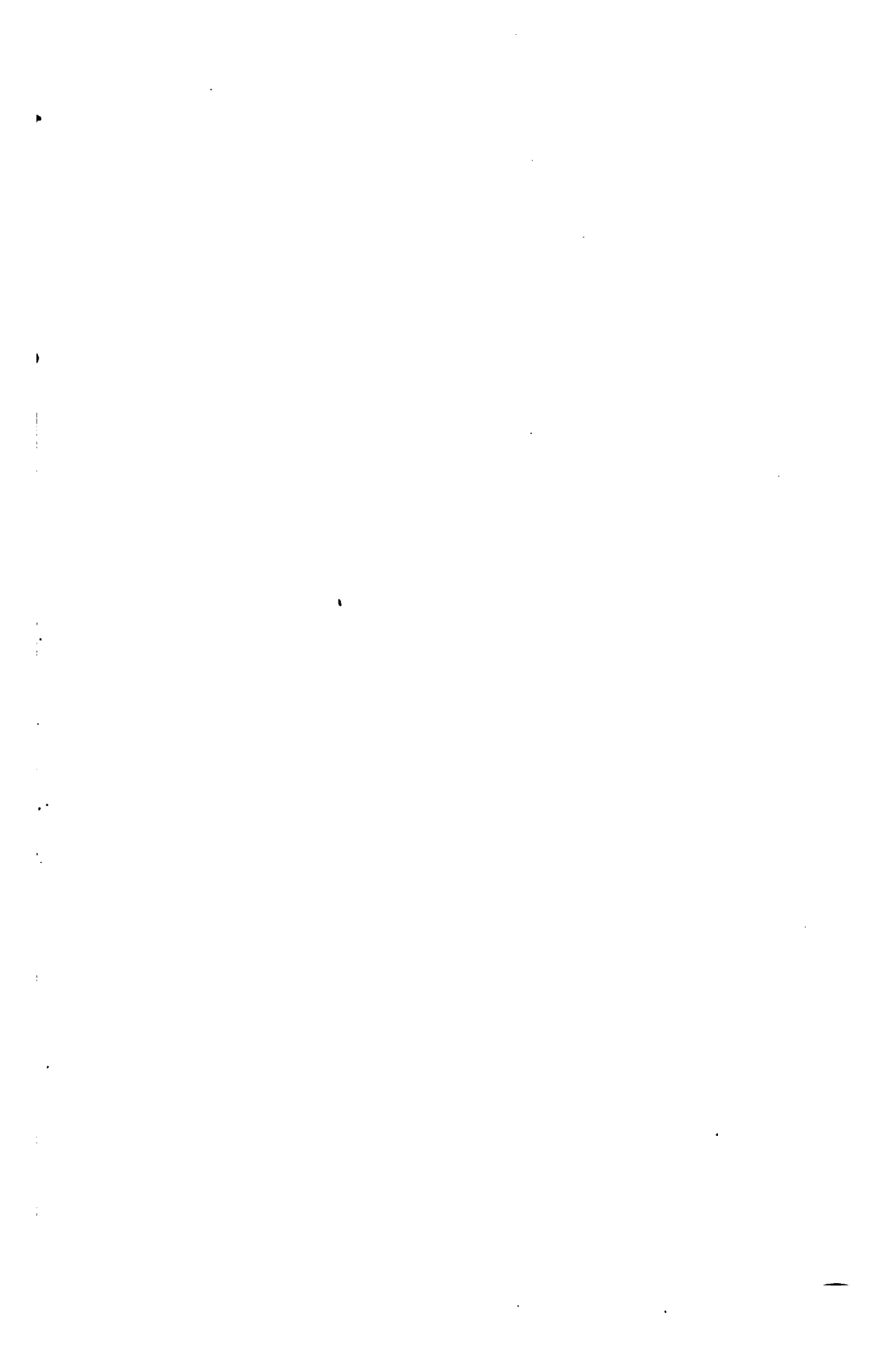
◀ In 1836 Mexico took under consideration the formation of a bishopric of California, passing the law hereafter given, pursuant to which Francisco Garcia Diego, last president of the missions, was made the first incumbent of the bishopric, assuming his office about 1840. The law (Transcript, pp. 469 and 580) reads as follows:

LEY SOBRE ERECCION DE UN OBISPADO EN LAS DOS CALIFORNIAS.

ART. 1. El gobierno, oyendo á los que por derecho toque, y á los demás que juzgue oportuno, formará un expediente instructivo de la necesidad que haya de erigir un obispado en las dos Californias.

ART. 2. Si del expediente resultare haber aquella necesidad, dará cuenta con él á la Santa Sede para la aprobacion y ereccion de dicha mitra.

ART. 3. El gobierno escogerá la persona que creyere mas conveniente, de la terna que al afecto forme el cabildo metropolitano, y la propondrá á su Santidad.



ART. 4. Al electo se la acudirá del erario público con seis mil pesos anuales mientras el obispado no cuente con rentas suficientes.

ART. 5. Durante las mismas circunstancias se le auxiliará del propio erario con tres mil pesos para la expedición de las bulas y traslación á su silla episcopal.

ART. 6. Se pondrán á disposición del nuevo obispo y de sus sucesores, los bienes pertenecientes al fondo piadoso de Californias, para que los administren é inviertan en sus objetos ú otros analogos, respetando siempre la voluntad de los fundadores.

Se circuló en el mismo día 19 por la secretaria de justicia, y se publicó en Vando de 22. (Colección de leyes y decretos Julio á Diciembre de 1836, p. 107.)

[Translation.]

LAW CONCERNING THE ERECTION OF A BISHOPRIC IN THE TWO CALIFORNIAS.

ARTICLE I. The Government, after hearing such parties as by law may be entitled to a hearing on the subject, and such other persons as it may think proper to hear, shall thereupon make a report with regard to the necessity of creating a bishopric for the two Californias.

ART. II. If the report should show that there is such a necessity, the pope should be duly informed of the report, for him to approve of it, and create such a see.

ART. III. The Government shall select from three nominees, presented by the archbishop's council, the person whom it thinks most suitable, and submit his name for appointment to his holiness.

ART. IV. The person elected shall receive from the public revenues six thousand dollars per annum, until such time as the bishopric shall be in receipt of a sufficient income.

ART. V. During a continuation of the same circumstances the public revenue shall furnish a subsidy of three thousand dollars per annum for the despatching of bulls and the traveling expenses of the episcopate.

ART. VI. The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the fund.

The present was put in circulation on the same day—the 19th—by the department of justice, and was officially made public on the 22d.

While the fund was under the administration of the bishop we are informed that he paid off a mortgage held by Mexico amounting to \$28,233 and that the income for the year 1841 amounted to over \$34,000 (Transcript, p. 149). The agent of the bishop in Mexico from 1840 to 1842, while the fund was being administered by him, was Don Pedro Ramirez, and his special agent for the rural estates was Miguel Balaunzaran. In the year 1842, without any cause therefor appearing

from the record, the Mexican Government determined to take possession of the Pious Fund.) Prior to the taking of such possession and on February 5, 1842 (Transcript, p. 501), it called upon Ramirez for a statement of the goods and properties constituting it. This he furnished on the same day, but in an informal and very defective manner (Transcript, p. 501), as appears from his comment apparently thereon (Transcript, p. 508). Considerable correspondence followed between Ramirez and the representative of the Government, and on February 8, 1842, the following decree was passed providing for the resumption by the Government of the management of the Pious Fund (Transcript, pp. 39, 469, 580):

DECRETO POR EL QUE REASUMIÓ EL GOBIERNO LA ADMINISTRACION E INVERSION DEL FONDO PIADOSO DE CALIFORNIAS.

Antonio Lopez de Santa Anna, etc., sabed:

Que siendo de un interés y verdaderamente nacionales todos los objetos á que está destinado el fondo piadoso de Californias, y debiendo por lo mismo estar bajo el inmediato cuidado y administracion del supremo gobierno, como antes lo habia estado, he venido en decretar:

ART. 1. Se deroga el Art. 6 del decreto de 19 Setiembre, 1836, en que se privó al gobierno de la administracion del fondo piadoso de Californias, y se puso á disposicion del R. obispo de esa nueva diócesis.

ART. 2. En consecuencia volverá á estar á cargo del supremo gobierno nacional la administracion é inversion de estos bienes en el modo y términos que este disponga, para llenar el objeto que se propuso el donante, con la civilizacion y conversion de los bárbaros.

Por tanto, mando se imprima, publique, circule y se le dé el debido cumplimiento.

(Decretos y órdenes del gobierno provisional, de Diciembre 14 á Junio de 1842, p. 334.)

[Translation.]

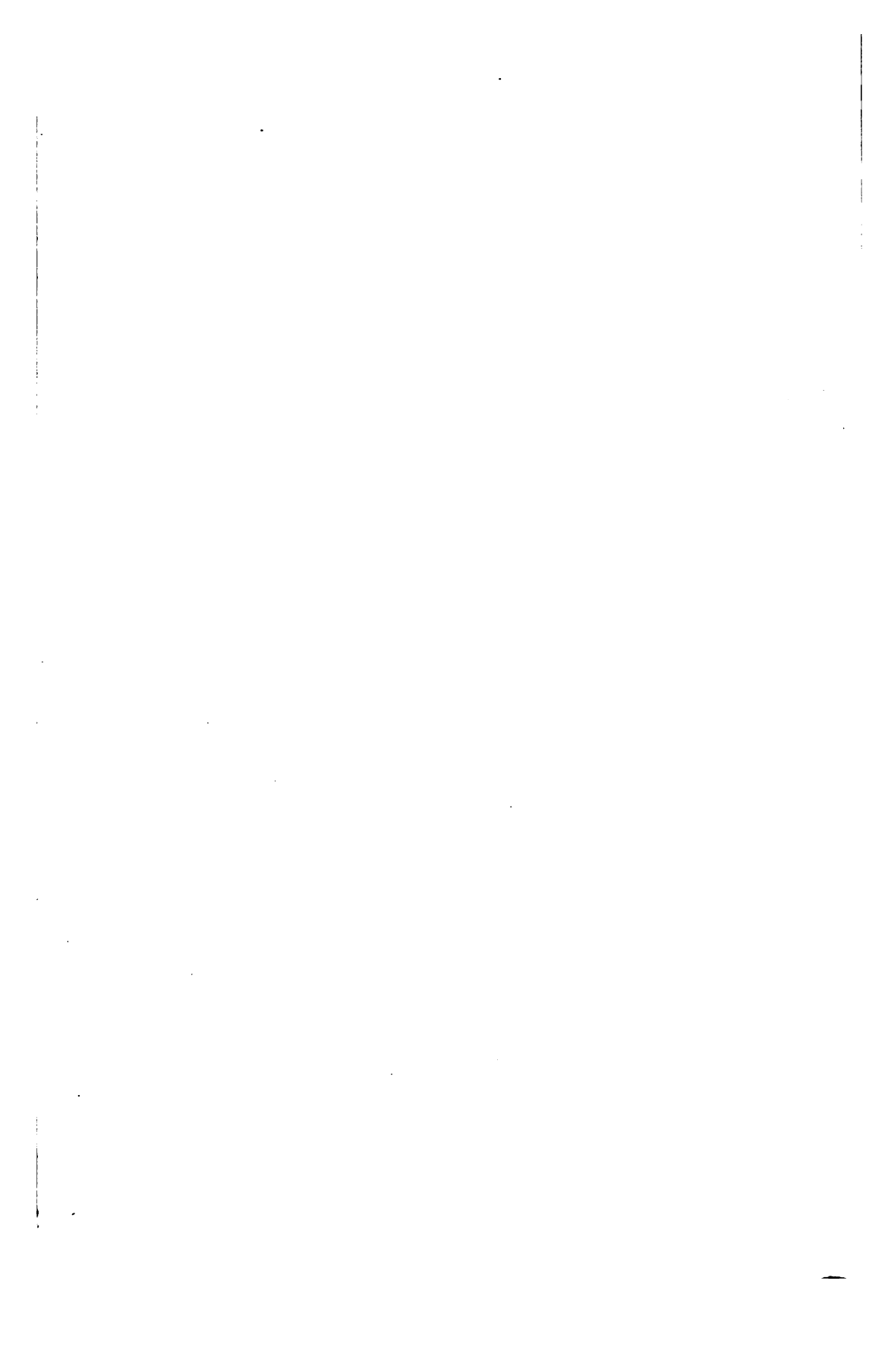
DECREE UNDER WHICH THE GOVERNMENT REASSUMED THE MANAGEMENT AND DISBURSING OF THE PIOUS FUND OF THE CALIFORNIAS.

Antonio Lopez de Santa Anna, etc., greeting:

Whereas all the purposes for which the Pious Fund of the Californias is intended is really of a general and national importance, and should therefore be under the immediate care and management of the supreme government as it formerly was, I have made the following decree:

ARTICLE I. The sixth article of the law of the 19th of September, 1836, by which the Government relinquished the management of the Pious Fund of the Californias, and the same was then placed at the disposal of the right reverend bishop of the new diocese is hereby repealed.

ART. II. The management and disbursing of the proceeds of this property shall therefore again become the charge of the



supreme government, in such way and manner as it shall direct, for the purpose of carrying out the intention of the donor, in the civilization and conversion of the savages.

Wherefore I order the present to be printed, published, and duly observed.

In the further correspondence between Ramirez and the representatives of the Government, we find a very full and exact statement of the properties of the Pious Fund at the time it was taken by Mexico. We learn from this that the various pieces of real estate yielded to the Pious Fund annually as follows:

Three-fourths of houses on Vergara street	\$2, 625
Three-fourths of estate of Ciénaga del Pastor	12, 825
Estate of San Pedro de Ibarra	2, 000
Estates of San Augustin de Amoles et al	12, 705
Total	30, 155

The foregoing would represent, capitalized at 6 per cent per annum \$502,583.33. To this Señor Ramirez adds as due from the public treasury (principal and interest) \$1,082,078 3 gr., and from private individuals \$71,464 1 real, and deducts as due by the fund \$32,380 4 r. 3 g., leaving, according to his figures, the value of the Pious Fund at \$1,656,125.33 at the time it was taken possession of by the Republic of Mexico.

The Mexican Government continued to administer the fund for only a short time, and on October 24, 1842, passed a decree incorporating its property into the treasury, a copy of said decree appearing in full in the transcript in English and Spanish in several places, and reading as follows (Transcript, p. 469):

Antonio Lopez de Santa Anna, etc., sabed:

Que teniendo en consideracion que el decreto de 8 de Febrero del presente año que dispuso volviera á continuar al cargo del supremo gobierno el cuidado y administracion del fondo piadoso de Californias, como lo habia estado anteriormente, se dirige á que se logren con toda exactitud los benéficos y nacionales objetos que se propuso la fundadora, *sin la menor pérdida de los bienes destinados al intento*; y considerando asi mismo, que esto solo puede conseguirse capitalizando los propios bienes é imponiéndolos á rédito, bajo las debidas seguridades, para evitar así los gastos de puedan sobrevenir; usando de las facultades que me concede la séptima de las bases acordadas en Tacubaya y sancionadas por la nacion, he tenido á bien decretar lo siguiente:

ART. 1º. Las fincas rústicas y urbanas, los créditos activos y demas bienes pertenecientes al fondo piadoso de Californias, quedan incorporados al erario nacional.

2º. Se procederá por el ministerio de hacienda á la venta de las fincas y demas bienes pertenecientes al fondo piadoso de

Californias, por el capital que representen al 6 por 100 de sus productos anuales, y la hacienda pública reconocerá al rédito del mismo 6 por 100 el total producido de estas enagenaciones.

3°. La renta del tabaco queda hipotecada especialmente al pago de los r ditos correspondientes al capital del referido fondo de Californias, y la direcci n del ramo entregará las cantidades necesarias para cumplir los objetos á que est  destinado el mismo fondo, sin deducci n alguna por gastos de administraci n, ni otro alguno.

Por tanto, etc.

[Translation.]

Antonio Lopez de Santa Anna, etc.:

Whereas the decree of February 8 of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in the charge of the Government, as had previously been the case, was intended to fulfill most faithfully the beneficent and national objects designed by the foundress *without the slightest diminution of the properties destined to the end*; and whereas the result can only be attained by capitalizing the funds and placing them at interest on proper securities, so as to avoid the expenses of administration and the like, which may occur. In virtue of the power conferred on me by the seventh article of the Bases of Tacubaya, and sanctioned by the nation, I have determined to decree as follows:

1. The real estate, urban and rural, the debits and credits, and all other property belonging to the Pious Fund of the Californias are incorporated into the national treasury.

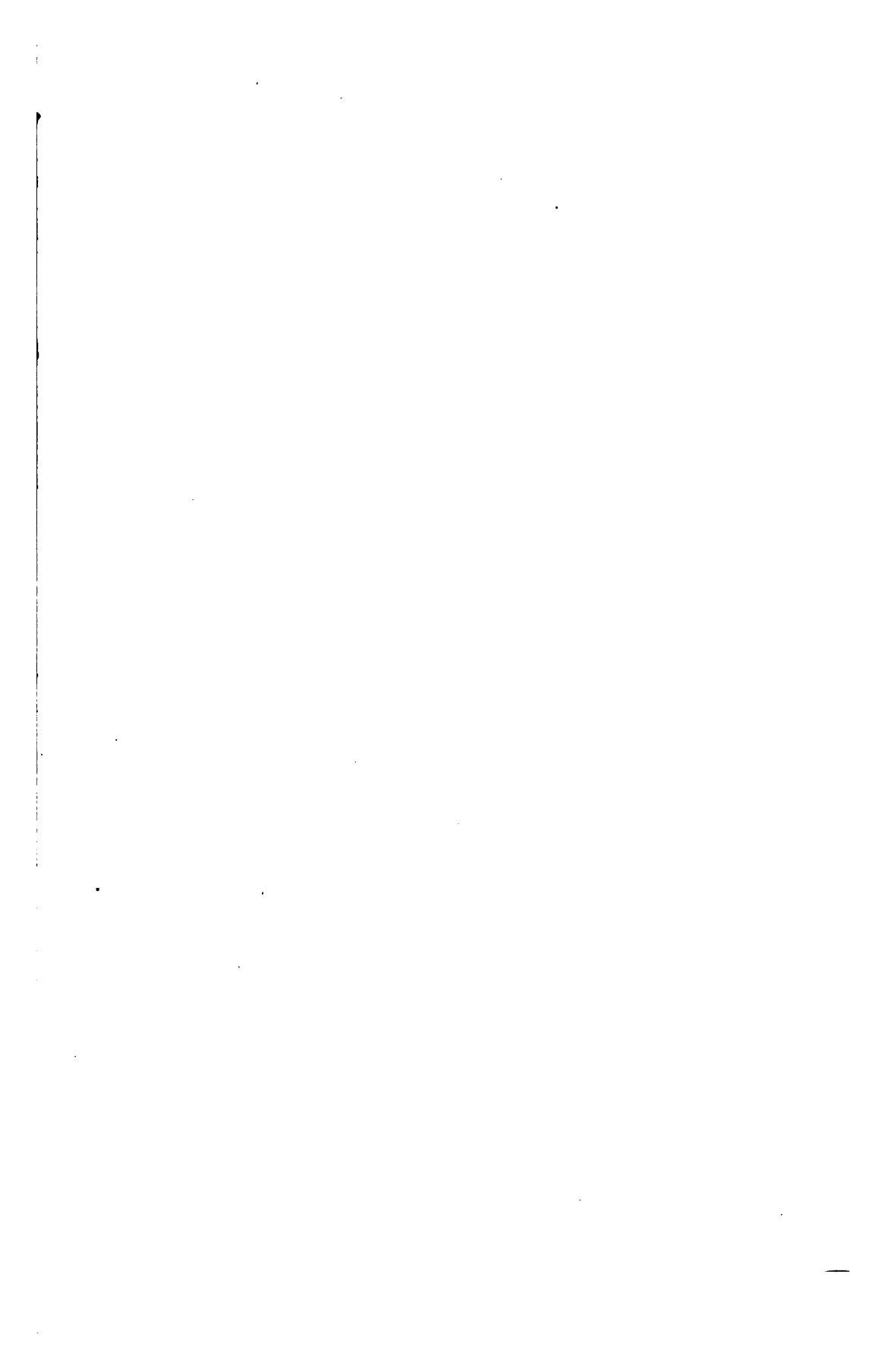
2. The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at 6 per cent per annum. And the public treasury will acknowledge an indebtedness of 6 per cent per annum on the total proceeds of the sales.

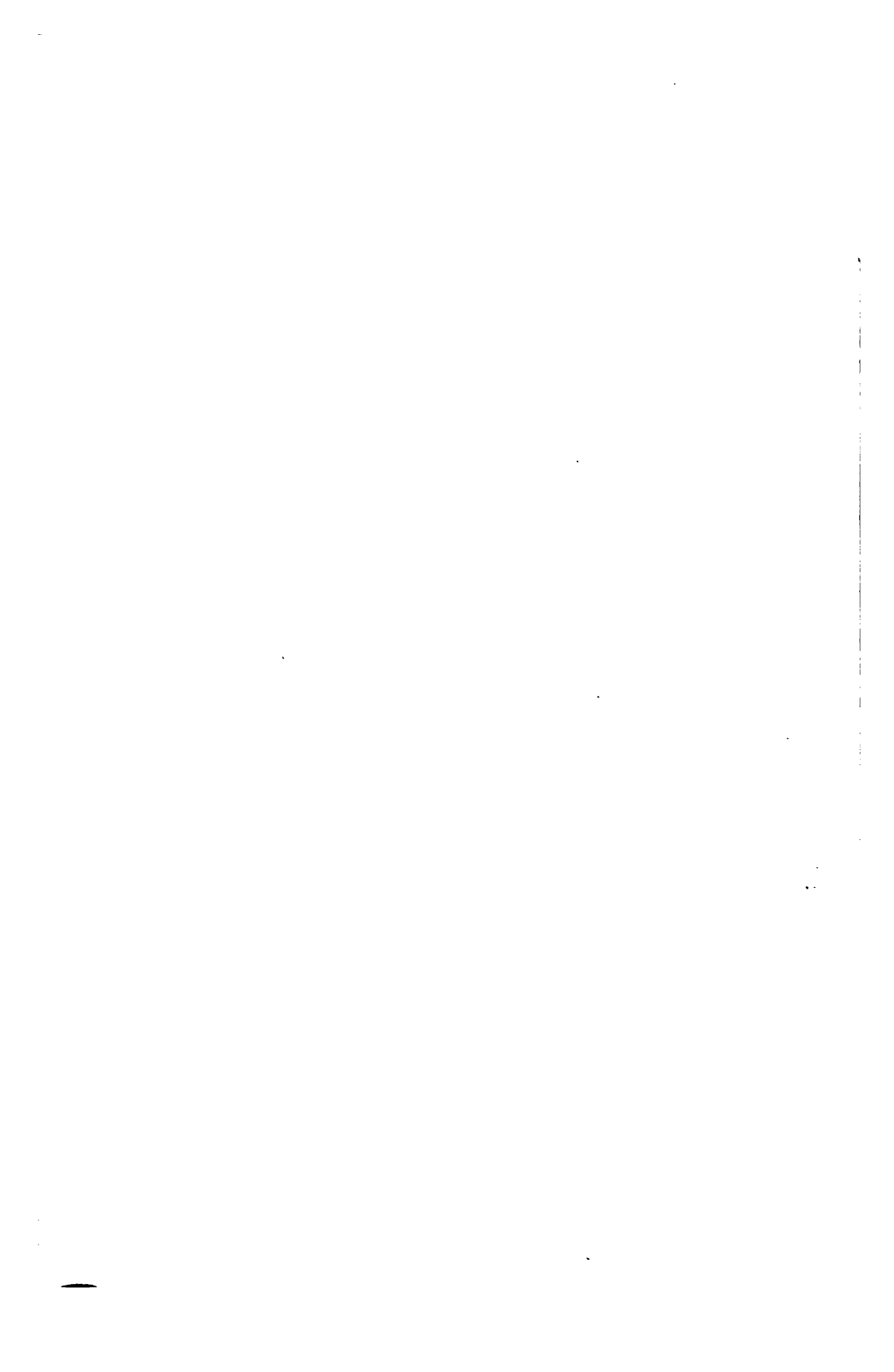
3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

Wherefore, etc.

Orders upon the revenue for tobacco were given from time to time for the benefit of the Bishop of California. We read a copy of one of them for \$8,000, on page 149 of the Transcript, described as given "on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the National Treasury."

We are not greatly concerned in the disposition which the Government made of the various properties taken by it, their capitalized value having been fully shown, as already appears by the statement of Sr. Ramirez, to which statement there was no demur on the part of the Mexican Government, in fact the inventory having been made





upon its demand (Transcript, p. 505). We may note, however, that in two places in the record some references are made to the sale or purchase of the several properties. In the extract from the work of M. Duflot de Mafras, entitled "Exploration du Territoire de l'Oregon," at page 216, it is stated that President Santa Anna sold the entire fund to the houses of Baraio and to Rubio Brothers, and in a note on page 476 reference is made to the treasury report of December 31, 1843, acknowledging in favor of the Pious Fund of the Californias the receipt of \$323,274.51, and from a like report dated June 20, 1844, the further sum of \$124,726.01 is acknowledged.

The last legislation had by Mexico with reference to the Pious Fund appears to have been a decree of April 3, 1845, which is to be found in the record on page 581, and which in English and Spanish reads as follows:

ABRIL 3 DE 1845.—*Ley: Sobre devolucion de creditos y bienes del fondo piadoso de Californias.*

El Excmo. Sr. presidente interino se ha servido dirigirme el decreto que sigue:

José Joaquin de Herrera, general de division y presidente interino de la República mexicana, á los habitantes de ella, sabed:

Que el congreso general ha decretado y el ejecutivo sancionado, lo siguiente:

"Los créditos y los demas bienes del fondo piadoso de Californias que existan invendidos, se devolverán inmediatamente al reverendo obispo de aquella mitra y sus sucesores, para los objetos de que habla el art. 6° de la ley de 19 de Setiembre de 1836, sin perjuicio de lo que el congreso resuelva acerca de los bienes que están enajenados."

APRIL 3, 1845.—*Law: Concerning the restitution of debts and property of the Pious Fund of the Californias.*

The most excellent president ad interim has been pleased to forward to me the following decree:

José Joaquin de Herrera, general of division and president ad interim of the Mexican Republic, to the inhabitants thereof:

Know ye that the general Congress has decreed and the executive sanctioned the following:

"The debts and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors, for the purpose mentioned in article 6 of the law of September 19, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated."

We are unable to learn that any property whatsoever was turned over to the bishops or other action taken because of or consequent upon this law.

Something should be added at this time with relation to the estate of Ciénaga del Pastor, referred to by Sr. Ramirez in his report to the

Mexican Government. At the time the report was made it was embargoed or attached for a heavy debt, but notwithstanding such embargo, as we expect the evidence will show, it was sold by the Mexican Government, and so far as the interest of the Pious Fund was concerned it produced \$213,750, and, aggregating with this the original claim as finally adjudicated by the Mixed Commission, the sums claimed by the memorial in this case because of the larger amount than formerly allowed, which was received from the property donated by Doña Josefa de Arguelles, erroneous deductions for a so-called debt, additional loans not credited, and personal property sold at the same time with Ciénaga del Pastor, we find as the sum total of the Pious Fund the sum of \$1,853,361.75.

It is to be noted that a difficulty arose between the Spanish and the Mexican Governments similar in nature to that now presented; such difficulty, however, arising out of the fact that under the terms of the settlement of the estate of Señora Arguelles the Philippine and the California missions were entitled to equal interests in three-fourths thereof. Spain, as the representative of the interests of the Philippine church demanded that there be paid to her the sums properly belonging to the Philippine portion of the fund. We ask that the same treatment as to the California branch of the claim be accorded us, regarding such settlement equally applicable in the one case as in the other.

ARGUMENT.

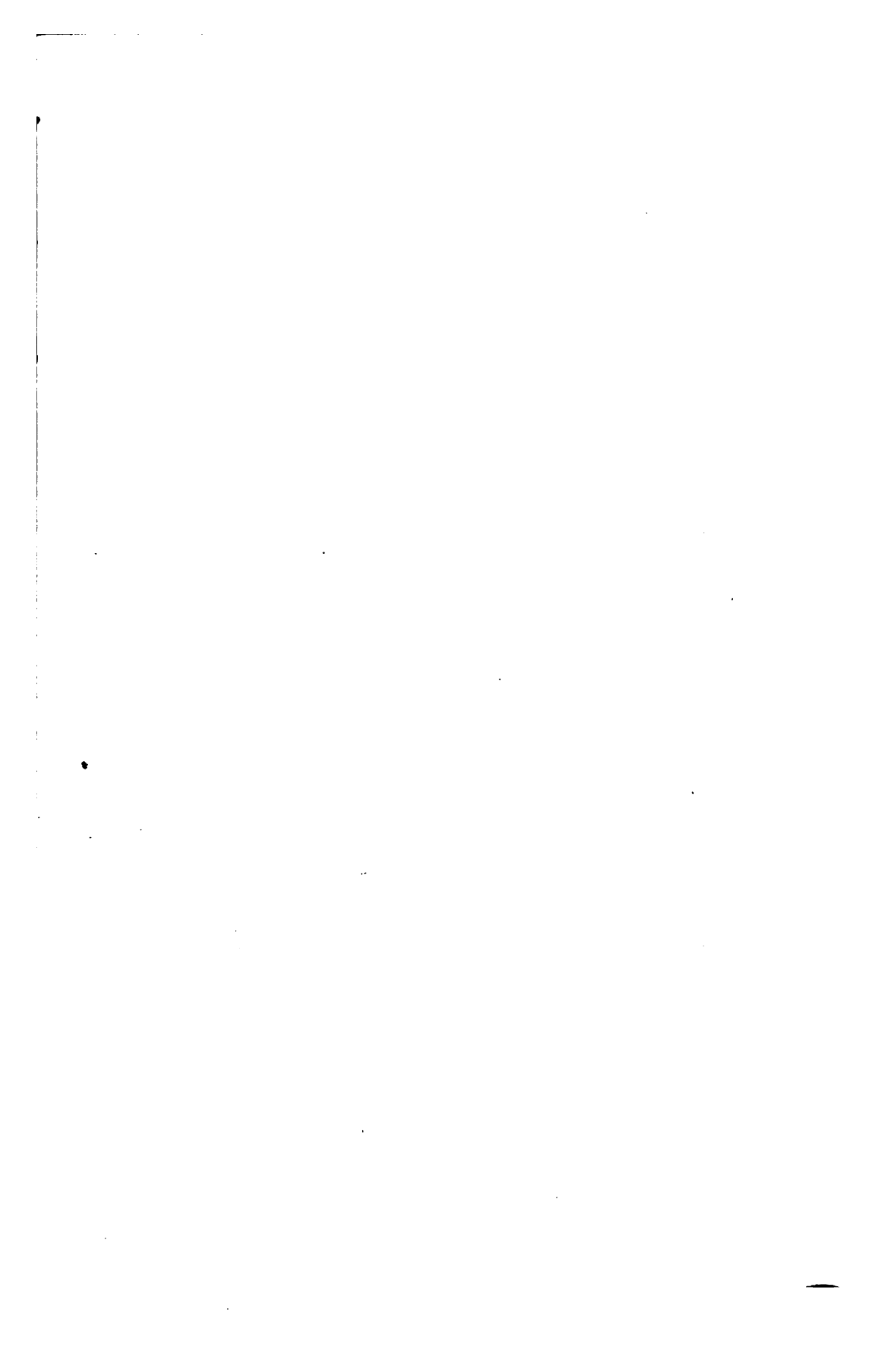
The United States confidently rely upon the findings of the former Mixed Commission as settling beyond the need of argument upon other points the issues now presented, and offer the considerations following in support of the position that—

THE AMOUNT OF THE PROPER JUDGMENT IN THIS CASE IS FIXED BY
THE TERMS OF THE FORMER AWARD.

Let us first consider, therefore, as this court is authorized to do by the terms of the protocol, the question as to whether the decision of the former Mixed Commission may be regarded as constituting as to any of the facts passed upon by it what is known to the common law as *res judicata*, or to the civil law as *chose jugée*, and if so, what facts are to be treated as settled thereby and what consequences flow from such settlement as affecting the subject-matter submitted to the present tribunal.

According to the first edition of the American and English Encyclopedia of Law, Title "Res Judicata," volume 21, page 128 —

When a matter has once properly passed to final judgment without fraud or collusion in a court of competent or concur-





rent jurisdiction it has become *res judicata*, and the same matter between the same parties can not be reopened or subsequently considered.

To somewhat similar effect, article 1351 of the French Code Civil says:

L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même, que la demande soit fondée sur la même cause, que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

It will thus be seen that the common law and the civil law view the subject-matter in similar lights.

We may fairly deduce from the citations above given that the first question to be considered is whether the former Mixed Commission was a court competent to render the decision at which it arrived, and to determine this we must reach a just conclusion as to whether it was authorized to pass upon, and did adjudicate, its own jurisdiction. If we give an affirmative answer to this proposition, then as a matter of interest, but necessarily of lesser importance in view of the conclusion reached, we might fairly consider whether the judgment of the tribunal as to its own competency was correct as a matter of law. This branch of the discussion is, however, fully covered by the Messrs. Doyle in their brief to be filed herein.

When a tribunal exists there must of necessity be authority in some person or body to judge whether the questions raised before it properly come within the purview of the powers with which it is invested. Sometimes the reviewing authority consists of an appellate or other tribunal superior by virtue of the general theory of the law controlling judicatory bodies. Sometimes the review is expressly provided for by the instrument constituting the court, and in cases such as that we are now examining it is always proper for the high contracting parties to retain a power of review, acceptance, or rejection of the conclusions reached by the commission, such power being reserved in the instrument creating it. Still another course is permissible, according to many authorities, when it is found that a court of arbitration is likely to exceed its just powers, and this is to withdraw the matters concerning which the exercise of excess of power is to be feared from the examination of the commission, and thereafter to decline to recognize judgments which may be reached. This course appears to be recognized by many writers on the subject of international law as proper, for they find, as we shall hereafter see, that a judgment rendered when one party or the other has not been heard or has withdrawn is a nullity.

Withdrawal from the Geneva Tribunal was threatened by England when the question of consequential or indirect damages was raised, and

her right so to do has been questioned by scarcely any writer, if we may except M. Rolin-Jaequemyns, who, in an article published in volume 4, *Revue de Droit International*, denies that England was at liberty to take this course, the contention raised by her coming fairly within the powers of the arbitrators to decide as being one relating to their jurisdiction.

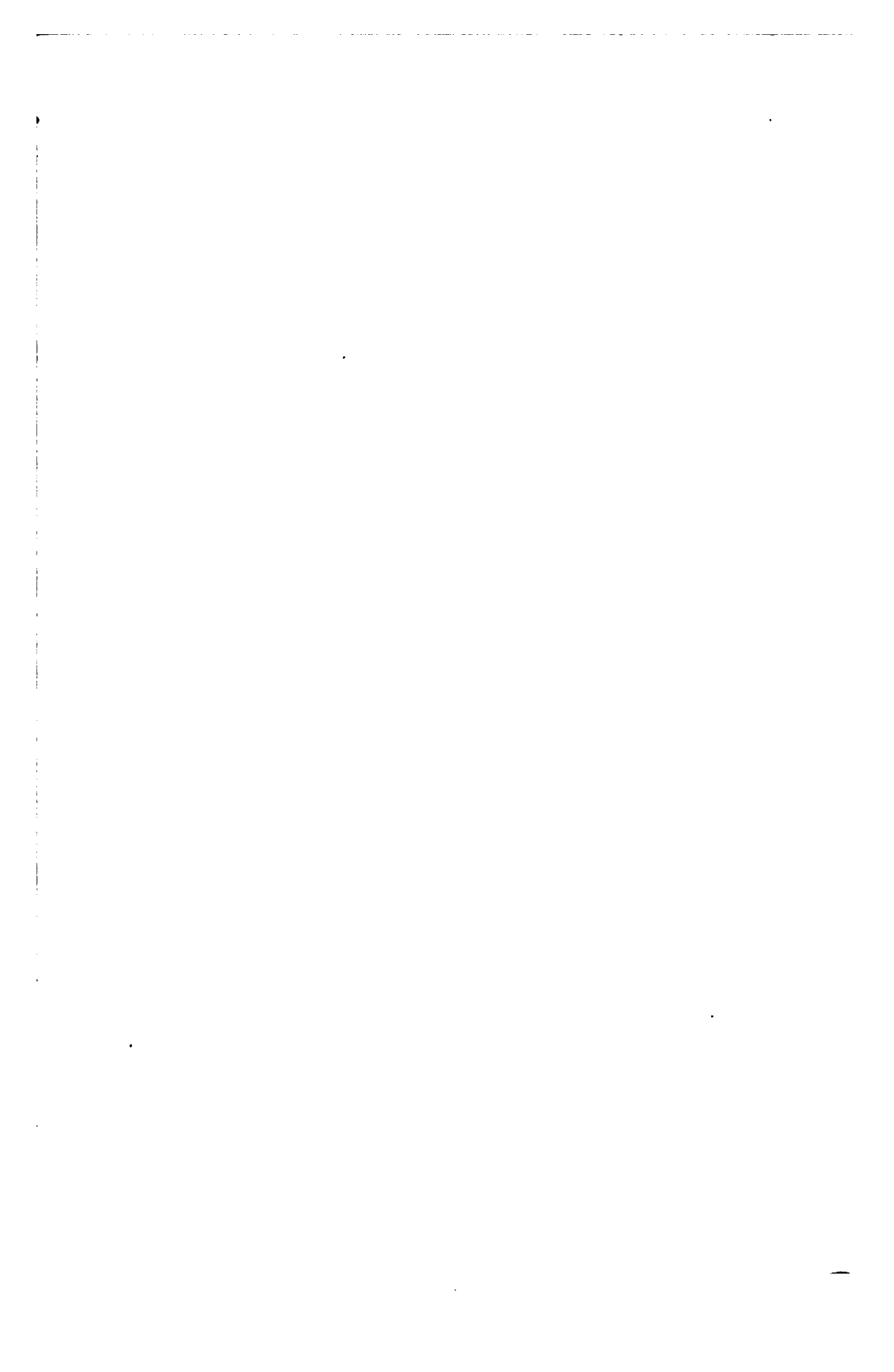
The treaty between the United States and Mexico did not provide for any reviewing power, did not reserve a right of ultimate rejection or dissent, and Mexico did not decline or refuse at any stage to proceed with the submission to the former Mixed Commission of the Pious Fund Claim. None of the things happened, therefore, which might have had a tendency to invalidate the former award, or to diminish its effect as *res judicata*. Furthermore, while Mexico formally filed a motion to dismiss, that country, the question yet remaining undetermined, proceeded to submit a great variety of testimony touching the contentions directly raised by the memorial and to argue as to its effect. This very course showed that Mexico recognized to the fullest the authority of the commission to render a final judgment upon the merits of the dispute, her conduct amounting to a practical waiver of any objection to the jurisdiction. We say this not unmindful of the fact that particularly in the argument on revision an attempt was made to renew her former objections, to enlarge their scope and to reinforce the motion to dismiss by additional arguments, but such motion could not revivify and strengthen a position finally and definitely abandoned, as her former contention had been, by an entry upon a discussion of the merits of the controversy. We shall find occasion later to enlarge upon this view of the question.

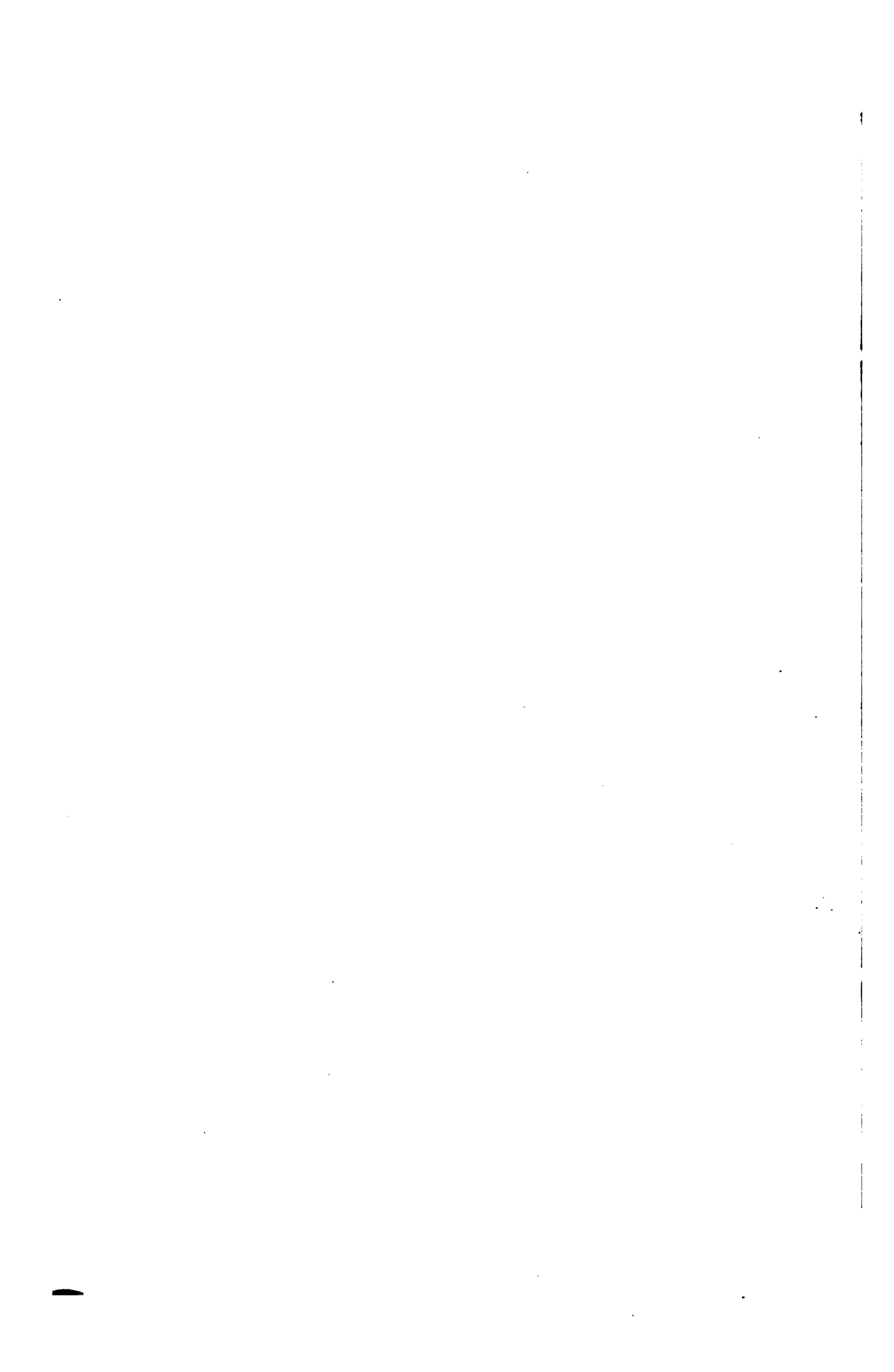
But if Mexico had not confessed jurisdiction, as she did by her actions more than twenty-five years ago, there would then have been left to us to consider as of the highest moment the questions heretofore raised. As it is, we would not be justified in passing them by without careful examination.

HAS AN ARBITRAL COURT INHERENT POWER TO PASS UPON ITS OWN JURISDICTION?

We have adverted to the principle that power must rest somewhere to determine the jurisdiction of an arbitral court, and in the case under consideration, this power not having been reserved for any other authority, must, as we believe, be considered to rest in the court itself.

The analogy existing between international and private arbitrations is such that we are justified in believing that if private arbitrators possess the power to determine their own jurisdiction and to interpret the instrument creating them, for stronger reasons must the





same power be regarded as resting in international arbitral courts, bodies of infinitely greater dignity and importance, and from whose actions consequences may flow of vastly more importance to the welfare of mankind.

We read in *Répertoire Général Alphabétique du Droit Français*, volume 12, title "Compétence Civile et Commerciale," paragraph 44, as follows:

Tout tribunal a le droit et la devoir de statuer sur sa propre compétence.

Civil law judges have many times passed upon the powers of arbitral courts in this respect, and have held (*Répertoire Général de Jurisprudence*, Volume IV, title "Arbitrage, sec. 572)—

Que les arbitres peuvent connaître de leur compétence bien qu'ils n'y soient pas expressément autorisés par le compromis, ce n'est pas la juger hors des termes du compromis: le droit de juger de leur propre compétence est la conséquence naturelle du caractère de juges dont ils sont investis par les parties.

From this flow, of course, the natural consequences expressed under the same title in paragraph 60.

Lorsque le tribunal se déclare compétent il doit nécessairement statuer sur la cause qui lui est soumise à peine de déni de justice. (Garsonnet, title 1, sec. 186, p. 752.)

The question as to the right of a mixed commission or international board of arbitrators to pass upon its own powers has several times been under active consideration. The earliest example in American practice is discussed in Moore's *International Arbitrations*, and relates to the commission formed under Article VII, of the treaty between the United States and Great Britain of November 19, 1794. In that case the British commissioners attempted by withdrawal to deny the power of the court to determine its own jurisdiction, but the British Government refused to sustain them in their position. We read that Mr. Gore, one of the American commissioners, held that—

A power to decide whether a claim referred to this board is within its jurisdiction appears to me inherent in its very constitution and indispensably necessary to the discharge of any of its duties. * * *

To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom. * * *

To my mind there can be no greater absurdity than to conceive that these two nations appointed commissioners with

power to examine and decide claims, prescribe the rules by which they were to examine them, authorize them for this purpose to receive books, papers, and testimony, examine persons on oath, award sums of money, and solemnly pledge their faith to each other that the award should be final and conclusive both as to the justice of the claim and to the amount of the sum to be paid, and yet gave them no power to decide whether there was any claim in question. * * *

It is a contradiction in terms to say that a measure adopted shall terminate all differences, and yet that the very measure presupposes a new negotiation on what are the differences. * * *

The objection that the board is incompetent to decide whether these cases or any of them are within the description submitted arrests and stops all proceedings, and, in fact, renders the article null and illusive. * * *

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction appears to be a contradiction too glaring to be persisted in. That the Commissioners have a right to decide in favor of one party only—in favor of the party complained against, but not in favor of the complainant—can not be true.

Mr. Pinkney, the remaining American Commissioner, entertained a similar view, and in part expressed it as follows:

I think that we are of ourselves, and without consulting the high contracting parties, the proper judges (at least in the first instance) of the nature and extent of our powers under the seventh article of the treaty, or, in other words, that it belongs to us, and is our indispensable duty in the first instance, to decide in every case referred to us, without reference to the contracting parties, whether the claim is such a one as the treaty submits to our award. * * *

Without such a power it is extremely obvious that the authority expressly communicated by the treaty to decide the merits of a claim and the amount of compensation to be awarded is completely nominal and illusory.

* * * If a reference to arbitrators takes place between individuals the arbitrators are always in the first instance the judges of the scope of the submission without any specific provision to that effect in the instrument of reference.

The question arising as above was referred to Lord Chancellor Loughborough, who said:

The doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and they must necessarily decide upon a case's being within or without their competency.

Wharton's International Law Digest, volume 2, section 221, page 568.

The note to the above reference shows that the view so expressed was adopted by Lord Grenville, then minister for foreign affairs. See 2 American State Papers (Foreign Relations), 398.

The question arose and was distinctly passed upon with reference to certain parts of the claim of the Venezuela Steam Transportation Company, although the reasoning of the court is not given. On page 26 of Morse's Report, as agent and counsel for the United States, we read that an objection being raised by the agent on the part of Venezuela to the jurisdiction of the Commission over certain parts of the claim, the court "do hereby unanimously declare ourselves competent on the said portions of the claim."

Instances might, in fact, be multiplied indefinitely of cases where arbitral commissions have accepted or rejected jurisdiction, but we fail to find a precedent for the denial of the authority of arbitrators to pass upon the interpretation of the instrument creating them, or a case until the present where their incapacity has been urged finally by the losing government to invalidate the effect of their awards.

In *Chronique des Faits Internationaux*, *Revue Générale de Droit International*, volume 1, 1894, p. 284, it is said:

L'arbitrage tend à devenir de plus en plus le droit commun international pour la solution judiciaire des conflits entre les États; si cela est, ne faut-il pas, dans le doute, se prononcer pour tout ce qui peut en favoriser l'extension?

Les arbitres doivent donc être seuls juges de leur compétence. Cette doctrine est conforme à la nature des choses: l'affirmation de ses pouvoirs est un attribut naturel de toute autorité. La règle que le juge de l'action est aussi le juge de l'exception est universellement admise dans les rapports de droit civil; pourquoi en serait-il différemment dans l'ordre international?

Telle est au surplus l'opinion de la plupart des écrivains du droit des gens; et l'Institut de droit international, réunion des jurisconsultes les plus considérables du monde entier, a donné à cette thèse l'appui de son autorité; le 28 août 1875, dans sa session de la Haye, il a en effet déclaré, à l'unanimité, que "les arbitres doivent prononcer sur les exceptions tirées de l'incompétence du tribunal arbitral. * * * Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire." (Art. 14, sec. 2, 4.)

The opinion of Calvo is expressed in section 1768 as follows:

Ils ont le droit d'interpréter le compromis préalable intervenu entre les parties, et par conséquent de prononcer sur leur propre compétence.

Goldschmidt, in discussing the matter as quoted in the *Revue de Droit International* for 1874, page 440, says:

Le danger d'un excès de compétence ne justifie point une immixtion préjudicielle du tribunal officiel. Dans l'arbitrage international il y a cette raison de plus, qu'une procédure judiciaire préliminaire est impossible.

Citing further from text writers, we would refer to Pradier-Fodéré, who, in his *Traité de Droit International Public*, section 2622, says:

En principe l'arbitre, ou les arbitres, sont juges de leur compétence; la règle du droit commun que le juge de l'action est aussi le juge de l'exception leur est applicable; ils ont le droit d'interpréter le compromis en ce sens que, lorsque les parties prétendent que telles réclamations, tels point du différent, ne sont pas soumis à l'arbitrage, et par conséquent ne sont point déferés à l'arbitre, ou aux arbitres, ces derniers peuvent examiner si cette exception est fondée; et dans le cas où elle leur paraîtrait sans fondement, ils peuvent retenir ces réclamations, ces points du différent, pour les comprendre dans leur décision. Cette doctrine est conforme à la nature des choses, car l'affirmation de ces pouvoirs est un attribut naturel de tout autorité.

The author continues in the same section on page 424 as follows:

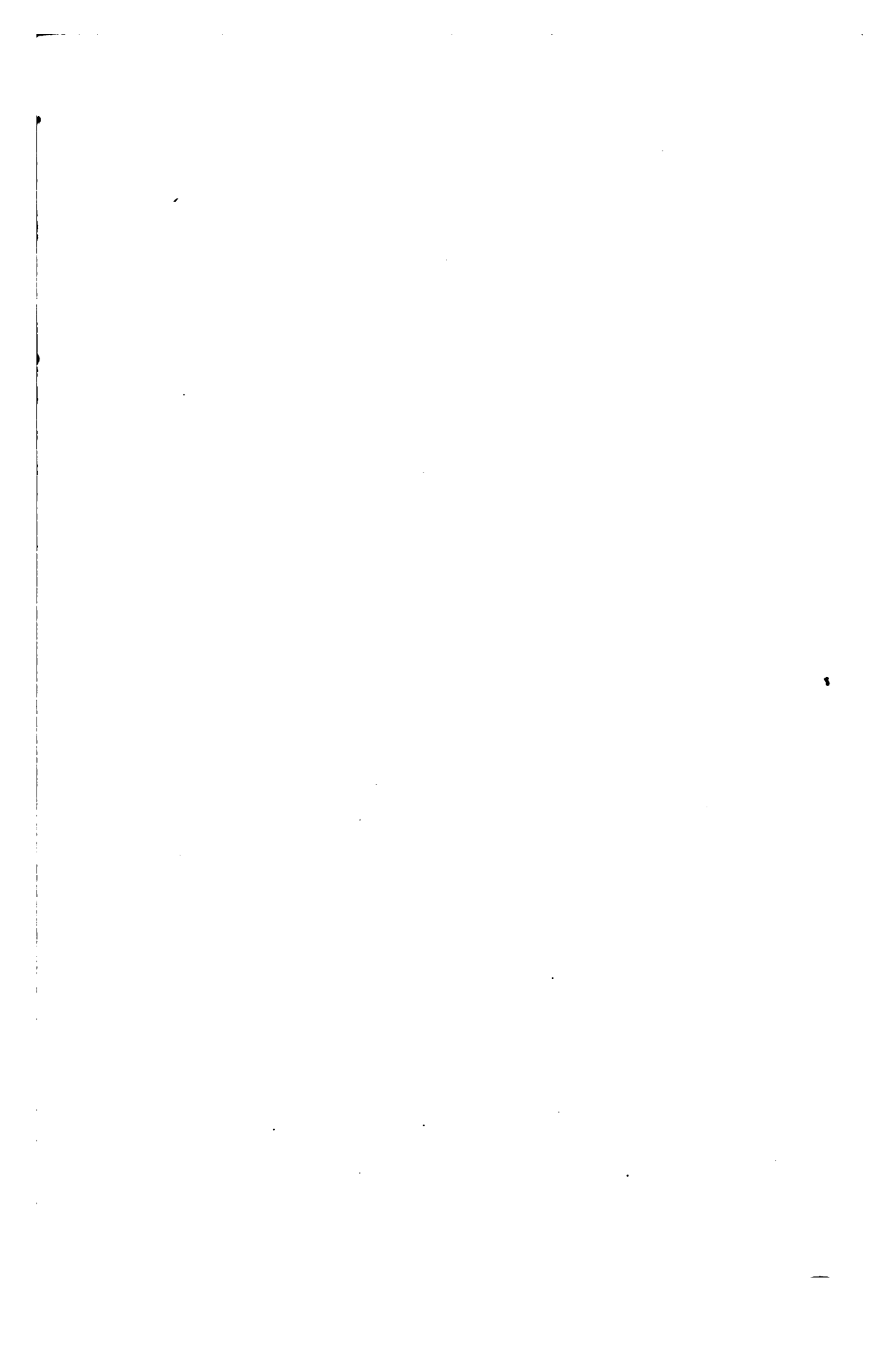
Les arbitres doivent donc être considérés comme juges de leur compétence avec le consentement tacite des parties, dans le silence du compromis et en l'absence de toute clause ultérieure; de plus ce consentement tacite produit son effet autant que les parties donnent suite à l'arbitrage sans manifester une volonté contraire.

So far as we have had an opportunity personally of examining the publications of leading text writers upon the subject of international law, there are but two who entertain a view at all contrary to that expressed by those whom we have cited, and the positions taken by them deserve some analysis.

M. Rivier, in his *Principes du Droit des Gens*, volume 2, page 174, says:

En cas de silence ou d'obscurité du compromis, l'arbitre n'est pas juge de sa propre compétence. En effet il n'est qu'un mandataire, et n'a d'autres pouvoirs que ceux qui lui sont conférés par la volonté des États parties au compromis. Il devra donc, la cas échéant, demander à ceux-ci de préciser le compromis ou de le compléter.

Waiving for the moment the discussion of the suggestion contained in the foregoing, it is worthy of note that according to the *Revue de Droit International* for 1875, page 277, M. Rivier was, with MM. Bulmerincq and Marquardsen, membre adjoint à la commission de la Procédure Arbitrale Internationale; the members of the commission being Messrs. Dudley Field, De Laveleye, and Pierantoni, and article



Art. 48 of the Hague Convention reads as follows: (P. 78 of Appendix) = "Le Tribunal est autorisé à déterminer son compétence en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international."

14, proposed by these gentlemen with apparent unanimity, provides as follows:

Les exceptions tirées de l'incapacité des arbitres, doivent être opposées avant toute autre. Dans le silence des parties toute contestation ultérieure est exclue, sauf les cas d'incapacité postérieurement survenus. Les arbitres doivent prononcer sur les exceptions tirées de l'incompétence du tribunal arbitral, sauf le recours dont il est question à l'art. 24, 2^{me} al., et conformément aux dispositions du compromis. Aucune voie de recours ne sera ouverte contre des jugements préliminaires sur la compétence, si ce n'est cumulativement avec le recours contre le jugement arbitral définitif. Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire.

We may, we think, fairly regard article 14, in the position of which M. Rivier joined, as offsetting the expression of opinion given by him in his *Principes*, and which we have already quoted.

The only other notable writer whose works we have had an opportunity of examining, and whose expressions tend to deny the right of arbitrators to pass upon their own jurisdiction, is M. Bonfils, who in his *Droit International Public*, third edition, sec. 951, says:

Les pouvoirs des arbitres sont déterminés par le compromis qui les en investit. Les arbitres ne peuvent pas statuer eux-mêmes sur leurs pouvoirs et déterminer les limites de leur compétence. Bluntschli pensait autrement (op. cit., art. 492 bis); mais son opinion est erronée. Un mandataire ne saurait fixer lui-même la portée et l'étendue de son mandat. Si des doutes se produisent, les arbitres doivent en référer à leurs mandants et leur demander l'extension de leurs pouvoirs et une fixation plus nette et plus précise de l'objet du compromis.

The editor, commenting upon the above, finds that article 48 of The Hague convention "a consacré l'opinion de Bluntschli."

The very statement by M. Bonfils of the ground of his opinion appears to us to demonstrate its erroneous character, for if, whenever the jurisdiction of an arbitral tribunal be challenged, the arbitrators are obliged to refer to their so-called mandants for permission to proceed, their operations will be paralyzed, and through the efflux of time, in many cases, the obtention of a final judgment rendered impossible.

But the fundamental idea expressed by MM. Rivier and Bonfils is fatally erroneous in that it does not correctly express the character to be accorded to an arbitral tribunal. We do not recognize the court before which we have the honor of appearing as a collection of agents, incapable of determining their own powers and compelled in cases of doubt to appeal to the countries creating them. It is true that the jurisdiction of this court is limited, but within the bounds of such

jurisdiction we believe its powers to be plenary. Its judgments should be recognized like the judgments of all other arbitral courts as binding upon the parties appealing to it, even though the results in particular instances may not be such as would be desired by one of the litigants.

The opinion we express as to the dignity of the present court applies with equal force to the former Mixed Commission, formed as it was with the free consent of the same parties, and exercising similar, though in some respects even more extended, powers, and the reasons which will justly operate to give solemnity and finality to the findings of this honorable court must equally as well serve to maintain the integrity and sanctity of the judgment of the Mixed Commission.

Without elaborating the discussion at this moment, we are justified in inviting your attention to certain expressions of distinguished publicists in marked opposition to the idea that arbitral courts are assemblages of agents.

Says Hall in his *International Law*, chapter 11, section 119:

The arbitrating person or body forms a true tribunal, authorized to render a decision obligatory upon the parties with reference to the issues before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.

The opinion of M. Calvo is also to the point. He says in section 1768:

Les arbitres, une fois nommés, forment, bien qu'ils ne tiennent leurs pouvoirs que des parties, un corps indépendant, un véritable tribunal judiciaire. Ils ont le droit d'interpréter le compromis préalable intervenu entre les parties et par conséquent de prononcer sur leur propre compétence.

In his *Essai sur l'Organisation de l'Arbitrage International*, M. Le Chevalier Descamps says:

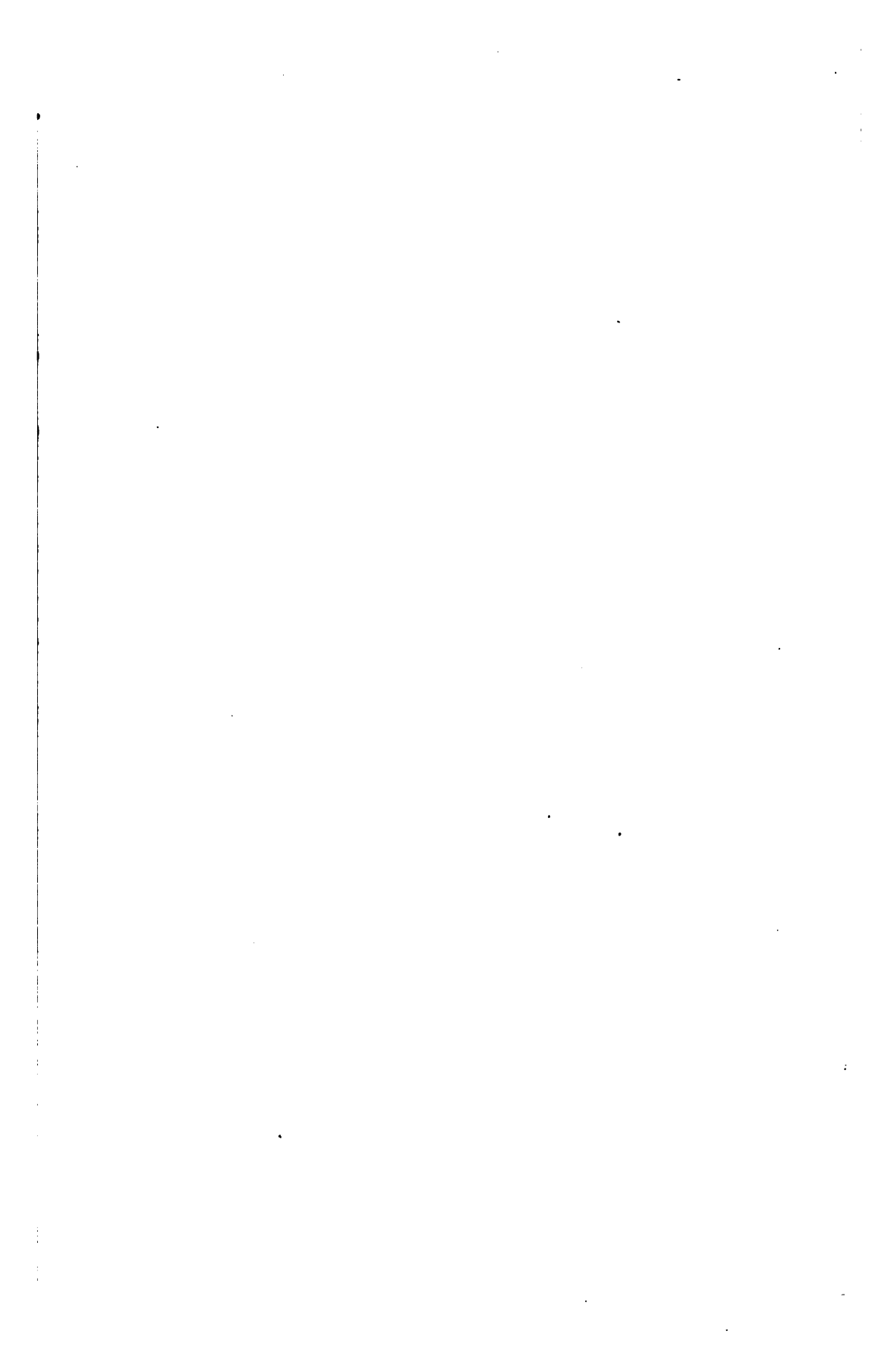
L'arbitrage n'est pas une tentative de conciliation. L'arbitre est juge et statue comme tel.

He cites with approval M. Le Baron Lambermont, who, in addressing to the German and English Governments his sentence in the arbitration of Lamu, says:

Arbitre et non médiateur, je n'avais à dire que le droit.

We will refer again to section 572, title "Arbitrage," Volume IV, *Répertoire Générale de Jurisprudence*, for the expression of many judges that:

Le droit de juger leur propre compétence est la conséquence naturelle du caractère *de juges dont ils sont investis par les parties*.



Queret vs. Andromy is cited in note on p. 795. *Fille*
A. & A. Vol. 2. *Eqcy.*, which also refers to *Wheeler vs. White*,
97 Ala. 615; *Porter vs. Parkfield Branch R. Co.*, 82 Me. 539;
Gray vs. Reed, 65 Ct. 178.

Similarly where legal questions have been submitted to an
arbitrator in subsequent suit on same subject matter, held that
award was the law which governed the case. *Linford*
vs. Smith, 12 Gratt. (N.H.) 554. Cited p. 795. *Eqcy.*
Vol. 2. *Fille A. & A.*

The same work under the same title says (sec. 1107):

Il est vrai que les arbitres ne sont pas revêtus de fonctions publiques et que leurs pouvoirs n'ont d'autre source que la volonté des parties. Mais il faut remarquer que le législateur ne considère pas les arbitres comme de simples mandataires; leur sentence a par elle-même autorité de chose jugée; de plus, elle ne peut pas être révisée, quant au fond, par le juge qui est chargé d'y apposer son ordonnance d'exéquatur. C'est donc que les arbitres ne sont pas seulement des mandataires, mais aussi des juges; et par conséquent, leur sentence doit avoir la même force probante que les jugements.

As apropos might in fact be cited all the authorities already quoted, showing that arbitrators have a full right to pass upon their own competency, for this is a power never possessed by or accorded to agents or mandataries, but pertaining to courts in the fullest sense of the word.

RULE OF INTERPRETATION OF THE COMPROMIS.

Some of the writers upon international law have laid down a rule for the interpretation of the compromis, which rule seems to us in accord with common sense and with the necessities of the situation, and presents to us the point of view from which the former Mixed Commission may properly have regarded the instrument they were called upon to construe. Calvo says (sec. 1757):

Dans tous les cas où le tribunal arbitral entretient des doutes sur l'étendue du compromis, il doit l'interpréter dans son sens le plus large.

M. Rolin-Jaequemyns in *La Revue de Droit International*, Volume IV, page 13, says, in effect, that:

La question de compétence ne doit pas être résolue par une stricte interprétation du compromis, mais qu'il faut dans le doute la trancher affirmativement. En effet cette affirmation ne porte aucune atteinte à la connaissance d'un tribunal ordinaire. Elle rend au contraire possible la décision judiciaire d'un point qui, sans cela, demeurerait litigieux. La jurisprudence Anglo-Américaine reconnaît, même en matière d'arbitrage civil, le principe que "a fair and liberal construction is allowed in its interpretation." (Bouvier au mot Submission No. 7.)

Inasmuch as without reserve Mexico submitted to the former tribunal the question of its own powers, it is not inappropriate at this time to refer to *Gueret v. Andoury*, Ct. of Ap. (Eng.), 62 L. J., 633, wherein it was held that where parties to a contract have referred to arbitrators the question of its construction, their award is conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract.

MEXICO WAIVED THE RIGHT TO OBJECT TO THE JURISDICTION OF THE
MIXED COMMISSION.

Without any reservation as to her rights, Mexico presented to the former tribunal a motion to dismiss not raising but, by failure so to do, waiving the question of jurisdiction.

Let it not be supposed that in submitting this point we rely upon a technicality, for it would seem that if there be any intention on the part of one party not to allow a given claim to go to arbitration, or under certain circumstances not to recognize the full validity of a judgment which may be rendered by the arbitrators, it is his duty to announce such fact in the beginning, since if such announcement be made the opposing party may at once agree to the withdrawal of the subject-matter and make the claim the foundation of a separate convention. To permit arbitrators to assume jurisdiction, and, a decision adverse to him being reached, to allow one party thereafter to aver that the arbitration has been without validity, is to give him a double chance of success.

The common law requires that all questions of a dilatory nature (including, first of all, jurisdictional ones) should be presented to the court before an entry upon the merits of the controversy, and that the same course should be taken before arbitral tribunals can be demonstrated by reference to several of the authors who have treated of this particular subject. According to the project of Goldschmidt afterwards substantially adopted at The Hague, and to be found in *Revue de Droit International* for 1874, page 440, section 18, it is provided that—

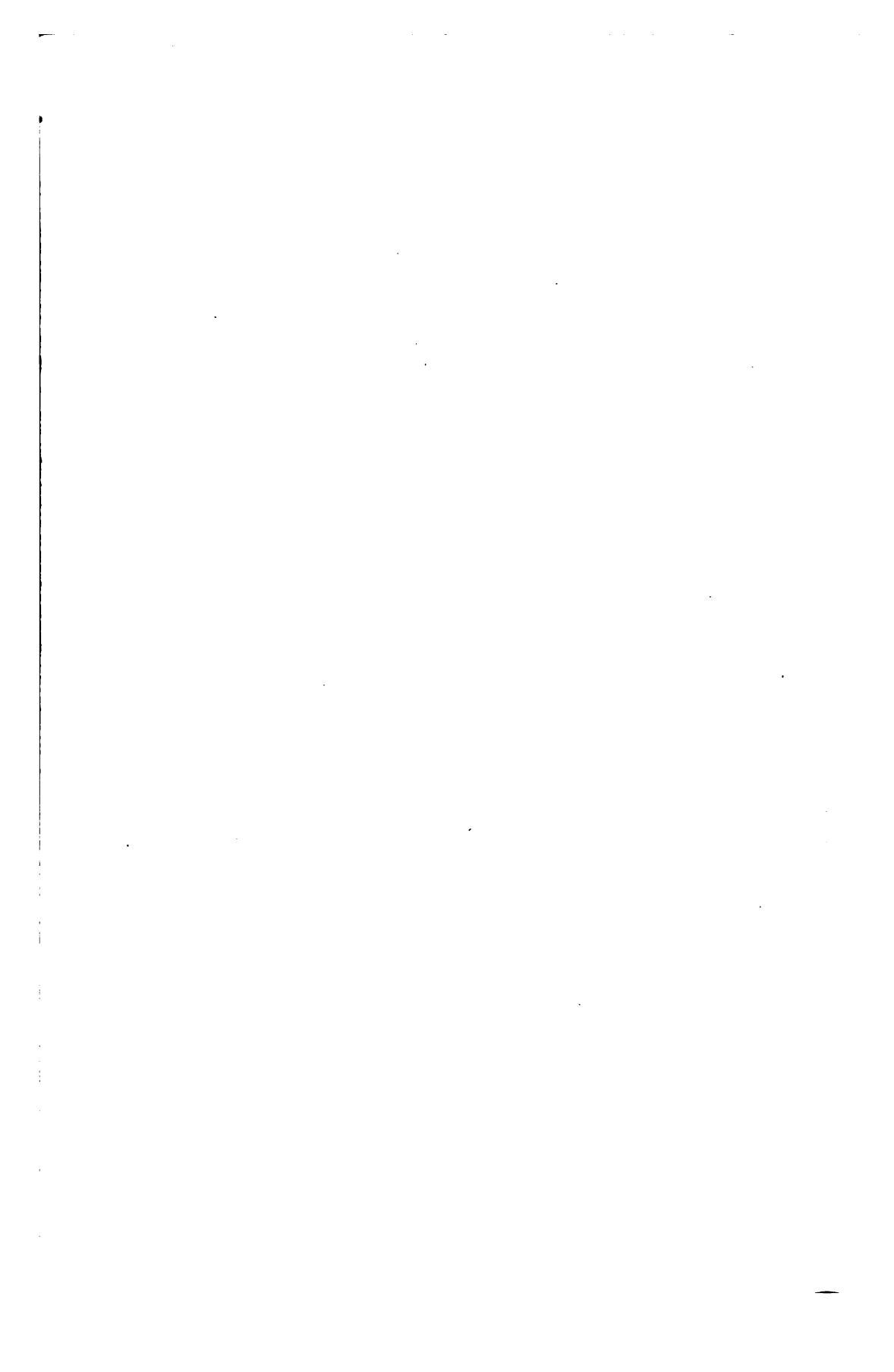
Le tribunal arbitral est juge de sa compétence. Si l'exception d'incompétence n'est pas opposée au premier moment opportun ou si l'exception opposée en temps utile ayant été repoussée par le tribunal arbitral, les parties passent outre sans faire de réserves, toute contestation ultérieure de la compétence est exclue.

A view indicated by M. Rolin-Jaequemyns as that proper to be taken by international courts is to be found in Volume IV, *Revue de Droit International*, page 139, wherein he says:

4. La partie qui soulève devant des arbitres internationaux une exception d'incompétence, a le droit d'y ajouter des réserves formelles de nullité totale ou partielle de la sentence pour le cas où l'exception serait rejetée par les arbitres. Faute de pareilles réserves, elle est censée avoir accepté d'avance la décision arbitrale comme définitive et sans appel.

According to Calvo, section 1757 of his work upon international law:

Lorsque l'un des contestants prétend que tout ou partie des demandes de l'autre ne rentre pas dans les termes du compromis, cette prétention doit être produite devant les arbitres, au début



de la cause, comme exception d'incompétence, et il appartient aux arbitres d'en connaître.

La partie qui soulève ainsi devant les arbitres une exception d'incompétence a le droit d'y ajouter des réserves formelles de nullité totale ou partielle de la sentence à intervenir pour le cas où l'exception serait rejetée par les arbitres. A défaut de présenter de pareilles réserves, la partie qui soulève l'exception est censée avoir accepté d'avance la décision arbitrale comme définitive et sans appel.

The language of M. Pradier-Fodéré is somewhat similar, for he says (sec. 2622, *Traité de Droit International Public*) that—

Lorsque, donc, l'une des parties soutient que la demande ou certains points de la demande de son adversaire ne rentrent pas dans les termes du compromis, cette affirmation constitue une exception d'incompétence dont il appartient à l'arbitre, ou aux arbitres, de connaître. Mais les États contendants sont maîtres d'enlever ce droit à l'arbitre, ou aux arbitres, dans le compromis ou dans une convention ultérieure, et, s'ils ne l'ont pas fait expressément, ils peuvent toujours, en renonçant à l'arbitrage, empêcher l'arbitre, ou les arbitres, d'interpréter le compromis et de prononcer sur leur compétence.

As we have already noted, the course taken by England with relation to consequential damages claimed in connection with the *Alabama* arbitration was quite in the line of the suggestion of MM. Rolin-Jaequemyns and Pradier-Fodéré, and in the spirit of the opinion expressed by M. Goldschmidt and M. Calvo, but no such course was taken by Mexico before the former tribunal. Mexico entered upon the consideration of the facts without the formal reservations indicated as possible, and without withdrawing from the tribunal, because of its lack of jurisdiction, the consideration of the *Pious Fund* case.

Having therefore failed to take any of the precautions, or to avail herself of any of the courses indicated as open to her by the various writers on international law, she must be conceived to have waived all of her rights to object to the jurisdiction of the former tribunal.

For the purpose of meeting all suggestions which may by any possibility be made, let us next examine the question—

DOES THE DOCTRINE OF RES JUDICATA APPLY TO ARBITRAL DECISIONS?

According to the decisions of civil law courts, an arbitral sentence in a private dispute has all the force of *res judicata* possessed by any other judgment, for it is said in *Répertoire Générale de Jurisprudence*, Volume IV, title "Arbitrage," section 1082:

Les sentences arbitrales acquièrent autorité de chose jugée comme les autres jugements, dès qu'elles sont devenues inattaquables par l'expiration de délais établies. (See also sec. 1083.)

The same work, title "Chose jugée," at paragraph No. 204, says:

Les sentences arbitrales sont de véritables jugements; elles sont donc investies de l'autorité de la chose jugée.

The common law holds to the same view of the matter, for it is said in American and English Encyclopædia of Law, (2d edition), title "Jurisdiction," Volume XVII, page 1055:

An award of arbitrators with jurisdiction can not be collaterally impeached for errors or irregularities in the proceedings.

And again (page 1056):

Whenever any person is given authority to hear and determine any question, such determination is in effect a judgment having all the properties of a judgment pronounced in a legally created court of limited jurisdiction.

The matter is further made the subject of discussion in the same work under the title of "Arbitration and award," Volume II, page 778, the following conclusion being reached:

The weight of authority in the United States leans toward making absolute the certain and simple rule that the award of arbitrators, when made in good faith, is final, and that it can not be questioned or set aside for a mistake, either of law or of fact.

In the case of *Boston Water Power Co. v. Gray*, 6 Metcalf (Mass.), 131, Chief Justice Shaw, one of the most eminent of American jurists, speaking of the weight to be attached to the finding of arbitrators, said:

It is within the principle of *res judicata*. It is the final judgment for that case and between these parties. * * * It would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction or a revising power acting directly upon the judgment alleged to be erroneous.

We thus see that the civil and the common law are entirely in accord upon the question of the weight to be attached to the findings of arbitrators, and this question being beyond dispute, as it seems to us, either from the standpoint of precedents and opinion or of natural reason, we may pass quickly to the consideration of the more important question:

DOES THE AUTHORITY OF RES JUDICATA ATTACH TO THE FINDINGS OF INTERNATIONAL BOARDS OF ARBITRATION?

Let us now investigate and determine whether there may be invoked as a consequence of the judgment of the Mixed Commission the results which would attach to the judgment of any court of competent jurisdiction.

Even when erroneous, the award, if fairly made, is binding. *Morse vs. Bishop*, 55 kt. 231, 17 P. 795. Vol. 2. Sney, Title A. & A.

"The rule is that an award is a final judgment, both at law and in equity, in regard to all the matters within the scope of the submission disposed of by it as between the parties thereto, binding on them for all time, unless it was merely provided that it shall have binding or award effect for a limited time only." *See* *Shackelford vs. Barker*, 2 Ark. Marshall (Ky.) 435; 12 Am. dec. 422; note on p. 805, Title A. & A. - Sney, Vol. 2.

If an award is admissible in evidence, it is conclusive between the parties. See many English and American citations, p. 805. Sney, Vol. 2. Title A. & A.

Every reasonable presumption will be made in favor of the award, unless it is clearly proved that the arbitrator exceeded his authority. 1 P. 670. Vol. 2. Sney, Title A. & A.

Arbitral decision creates res judicata unless jurisdiction be exceeded. Chond. p. 125.

We believe that we have already shown that the commission referred to was entirely competent to pass upon the question of its own jurisdiction, particularly as the question raised depended practically altogether upon the proper construction and application of the powers given it under the language of the treaty of 1868. Let us, therefore, see the results attendant upon this conclusion.

We may refer with propriety to article 18 of The Hague convention, under which the present tribunal operates, and which says:

La convention d'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

The foregoing article was adopted in the form reported to the delegates by M. Chevalier Descamps, who, in his report presented to the body in question, which report is to be found in *La Revue de Droit International* for 1900, page 225, says:

Dans l'arbitrage les États en litige défèrent conventuellement la solution de leur contestations au jugement d'une ou de plusieurs personnes chargées de "dire le droit" pour les parties en cause.

L'obligation de se soumettre de bonne foi à la sentence arbitrale est dans ces conditions une obligation positive impliquée dans la convention intervenue. Un arbitrage n'est pas une tentative de conciliation. Le trait caractéristique de l'arbitrage est précisément la soumission commune des États à un juge de leur choix, avec l'engagement à la sentence. À moins de dispositions spéciales du compromis attachant tel ou tel effet particulier à une sentence arbitrale et sauf usage de voies légitimes de recours, l'inexécution de la décision des arbitres n'est pas plus admissible en droit que la violation des contrats, et cela par la raison qu'elle est précisément la violation d'un contrat.

A careful consideration of the foregoing paragraphs must make it evident that M. Descamps and his associates upon the committee did not understand that they were creating a new law applicable only to decisions which might be reached under the court they were seeking to create, but rather announcing a condition which was believed by them to attach to all conventions for the settlement of disputes. Any other interpretation would render meaningless the words:

L'obligation de se soumettre de bonne foi à la sentence arbitrale est dans ces conditions une obligation positive impliquée dans la convention intervenue.

Further commenting upon article 18, M. Descamps says:

La rédaction primitive de l'article 18 était celle-ci: "La convention d'arbitrage renferme l'engagement de se soumettre de bonne foi à la sentence arbitrale." Le mot "implique" substitué au mot "renferme" sur la proposition de M. Rolin accentue

nettement, au point de vue qui nous occupe, le caractère et les conséquences du contrat d'arbitrage.

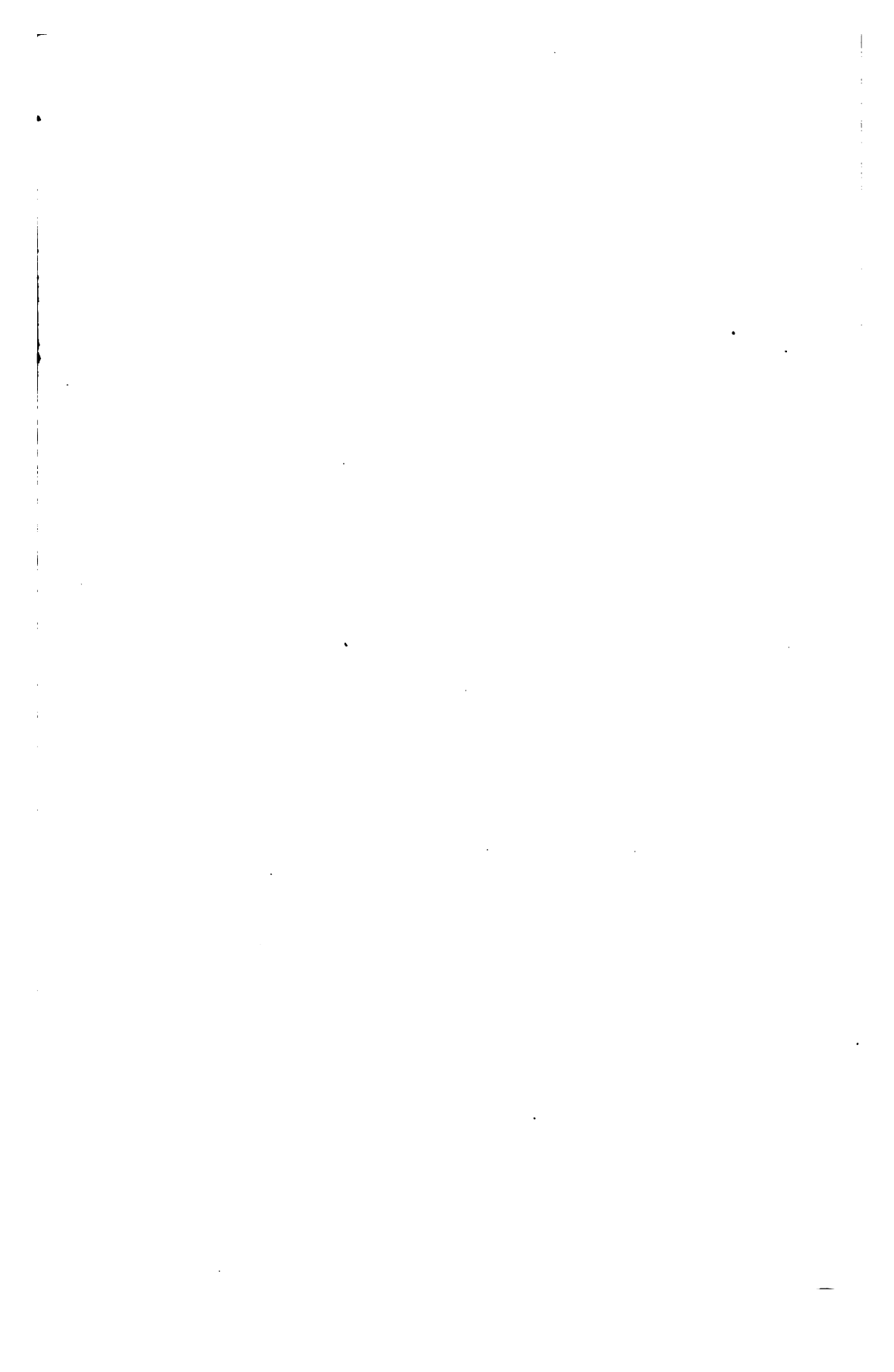
The action of The Hague convention in adopting article 18 shows clearly the authority, which, in the opinion of the eminent gentlemen constituting that convention, should be accorded to arbitral decisions. The reason for establishing this rule as to future conventions is no greater of course than the reason for regarding it as existing with relation to the conventions of the past, for it is not to be conceived that the delegates desired to claim for subsequent arbitral commissions a greater power and authority than they were willing to accord to those of times past. The view of the committee upon this point we have already seen.

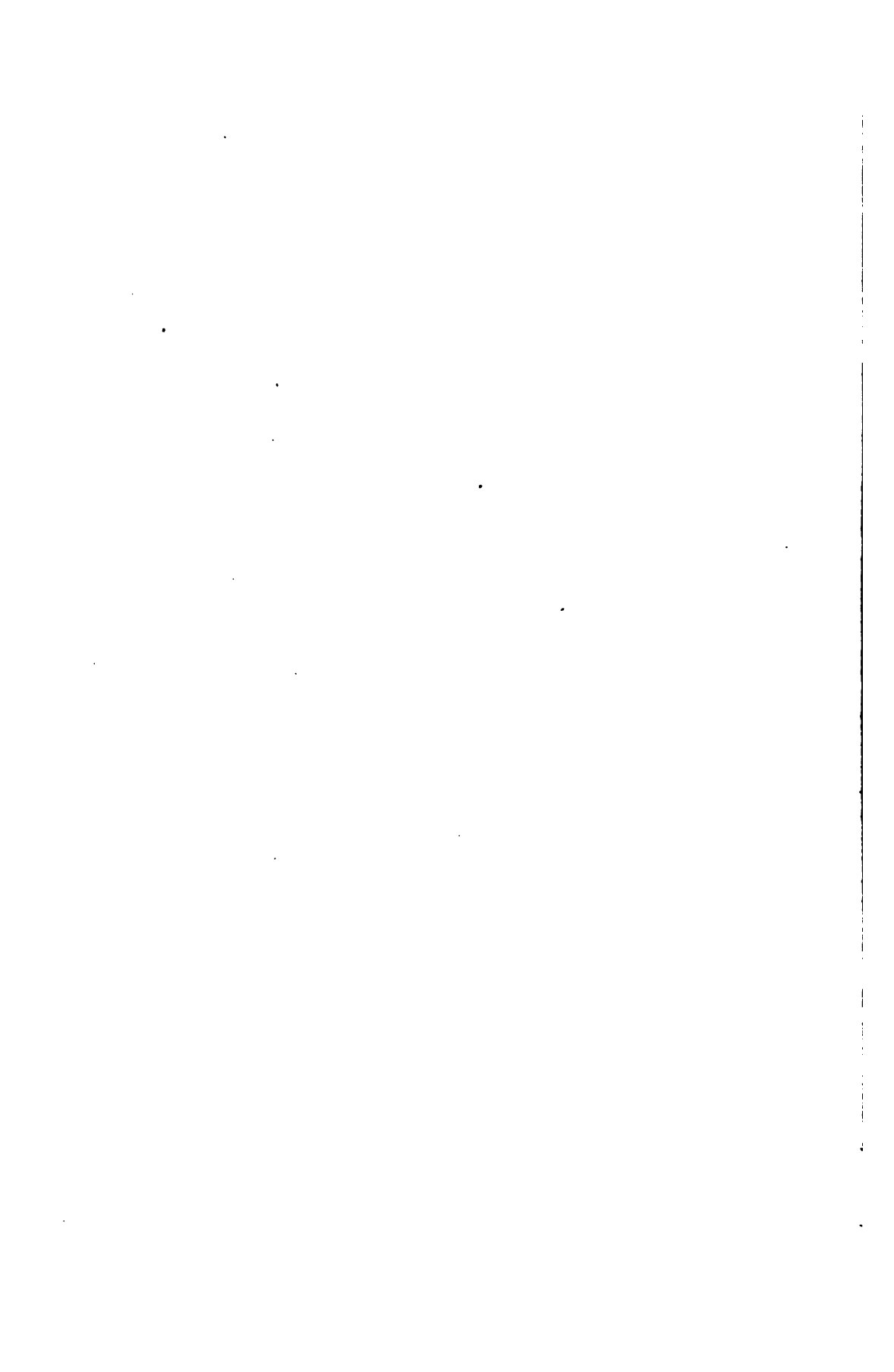
Commenting upon the article now under consideration M. Merignhac in his *La Conférence Internationale de la Paix*, on page 296, says:

Ainsi la décision arbitrale, qu'elle dérive d'un compromis fait après ou avant la naissance du litige, est obligatoire pour les parties, à la différence de la médiation facultative. Tous les auteurs sont unanimes à reconnaître que la sentence de l'arbitre est un jugement, qu'elle à l'autorité de la chose jugée; et, à cet égard, on pourrait multiplier les citations. Le fait du reste est ici d'accord avec le droit; et il n'y a pas d'exemple d'une nation ayant refusé d'exécuter une sentence prononçant contre elle une condamnation, sentence qui n'était d'ailleurs viciée par aucune cause de nullité. On doit donc se soumettre à la sentence arbitrale et on doit s'y soumettre de bonne foi, conformément au principe qui régit l'exécution de toutes les conventions internationales. L'article 18 précité ne fait qu'appliquer à l'institution de l'arbitrage ce principe général. Il faut néanmoins réserver le cas où le compromis contiendrait des clauses spéciales relativement à l'exécution et aussi à l'application des voies de recours qui y auraient été prévues. Mais, en dehors de ces circonstances exceptionnelles, le compromis constituant un contrat par lequel on accepte à l'avance la décision d'un arbitre, doit être exécuté de la même façon que les autres contrats internationaux. L'arbitrage de l'Alabama nous fournit un exemple mémorable de cette soumission unanime et nécessaire aux décisions arbitrales. L'arbitre anglais, sir Cockburn, après avoir refusé d'adhérer à la sentence de Genève, ajoutait dans son mémoire de protestation: 'J'espère néanmoins que le peuple anglais acceptera la décision des juges avec la soumission et le respect dus à la décision d'un tribunal dont il a consenti à accepter librement l'arrêt.

WHEN MAY ARBITRAL SENTENCES BE ATTACKED.

Having therefore established the duty of all persons appealing to courts of this nature to submit loyally to the award, let us examine and discover, if we may, in what cases it has been considered such sentences may be the subject of attack, to the end that we may learn whether the findings of the former Mixed Commission were open to





revision or were of such a nature as to require those submitting to the tribunal to recognize the decision as having in all respects the force of *res judicata*.

The general subject of the weight to be given arbitral sentences was under consideration by the Institute of International Law at The Hague in 1875, and in article 27 of the rules there established (see *Revue de Droit International*, Volume VII (1875), p. 282) it was provided that—

La sentence arbitrale est nulle en cas de compromis nul, ou d'excès du pouvoir, ou de corruption prouvée d'un des arbitres, ou d'erreur essentielle.

It is interesting to note that the foregoing paragraph omits (the reason for such omission not being explained) the explanatory words contained in the first draft by Goldschmidt, following the word "*erreur*," his draft making the sentence close—

erreur essentiellement causée par la production de faux documents.

The expression "*erreur essentielle*" has been severely criticised as leaving it uncertain whether the error in question be one of law or fact and as permitting possibly the continuance of the dispute for the determination of which the arbitration was formed, one side or the other claiming that there was essential error in the findings of the court, and for that reason proposing to refuse adhesion thereto. This weakness has been discussed quite at length by Merignhac in his *Traité de l'Arbitrage*, section 333, as follows:

La qualification "*d'erreur essentielle*" employée par l'Institut est vague; l'erreur dont il s'agit portera-t-elle sur le droit ou sur le fait; et, en outre, à quoi reconnaîtra-t-on qu'elle est essentielle? On se rend compte que les opinions varieront nécessairement dans une large mesure; et qu'une telle formule porte, par suite, en elle les germes de discorde d'autant plus dangereux qu'ils pourront facilement se transformer en causes de guerres! D'autre part, le point de savoir si la sentence émanée des arbitres privés donne lieu à un recours pour cause d'erreur, a été résolu de façons diverses par les législations positives; toutefois, quelque solution de principe qu'on accepte à cet égard, on constate tout au moins qu'en droit privé le recours pourra être porté devant une juridiction officielle placée au-dessus de l'arbitre et qui statuera sur l'articulation d'erreur. Mais, cette juridiction qui serait chargée d'apprécier l'erreur commise par l'arbitre, n'existe pas, on le sait, dans le domaine international, à moins que les parties n'aient pris soin de la prévoir et de l'organiser dans le compromis. En l'état actuel des choses, les parties demeureraient donc elles-mêmes juges de l'appréciation de l'erreur invoquée et partant de la validité de la sentence. Or, s'il est des cas dans lesquels on pourra sûrement affirmer que le droit a été violé, ou que les faits ont été mal appréciés, ces cas constitueront la grande exception; le plus souvent, par contre, la question sera douteuse et délicate. Admettre que la partie condamnée tran-

chera souverainement ce point, c'est livrer l'arbitrage à sa discrétion, et dénaturer son caractère obligatoire.

To our mind we may treat the words in question either as still qualified by the clause attached by Mr. Goldschmidt, or as referring by "*erreur essentielle*" to what we might call fundamental or jurisdictional error as distinguished from error as to the law or fact occurring during the trial of the cause, and this latter interpretation might appear to be almost of necessity the true one, for otherwise this very important point is but inadequately covered, inasmuch as "*excès du pouvoir*" may very well relate to cases where the arbitrators have had the right to exercise some power, but in this exercise have passed the limits set for them, as was the case in the noted arbitration by the King of the Netherlands of the dispute between the United States and England with relation to the St. Croix River, while "*erreur essentielle*," or, as we would suggest, jurisdictional error, would prohibit the arbitrators from proceeding at all.

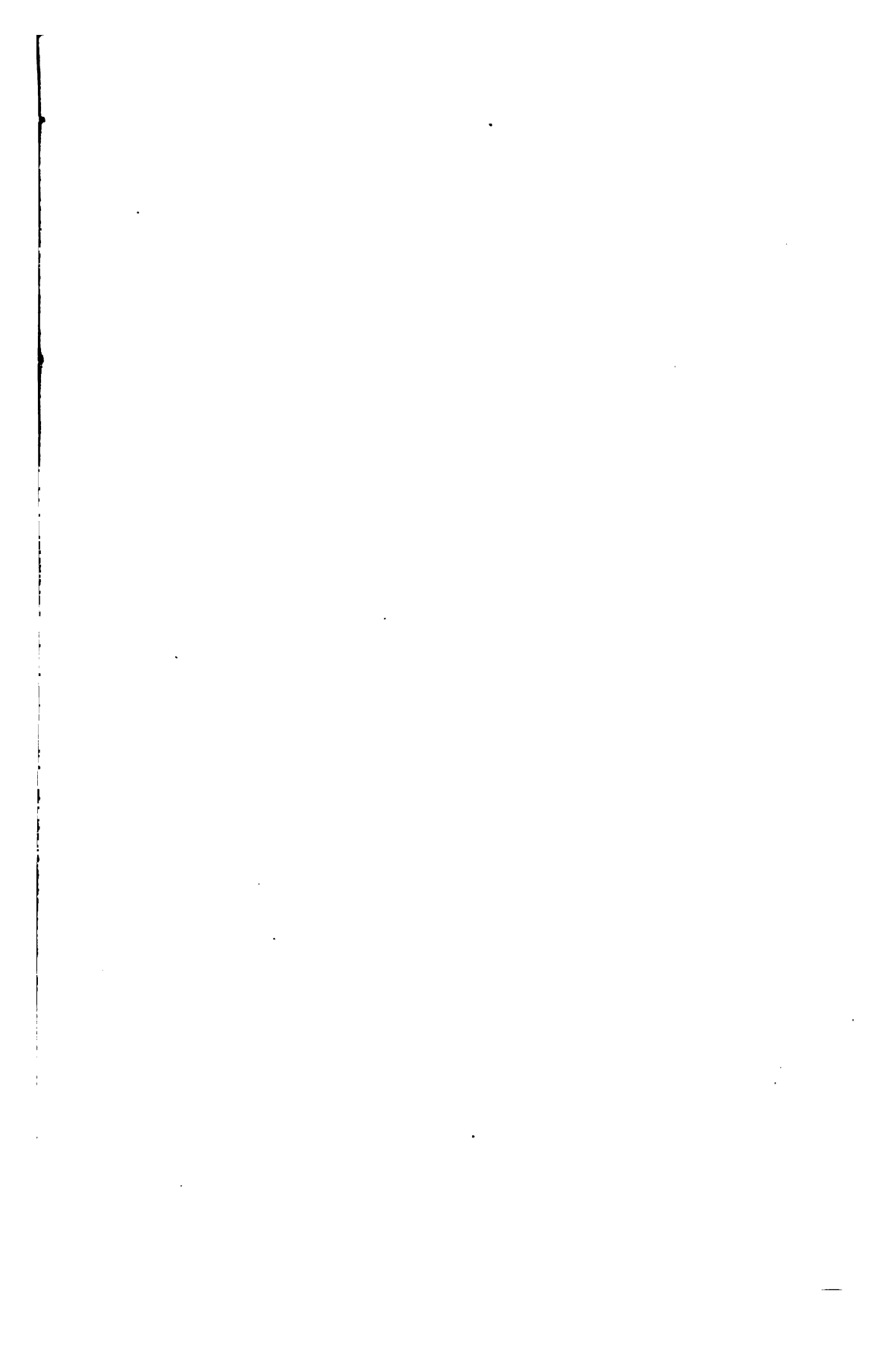
We shall have occasion to advert to this subject at a later period, meanwhile noting that in its present form, open as it is to discussion and dispute, the paragraph in question was adopted "*à la simple majorité*." (Revue de Droit International (1875), p. 277.)

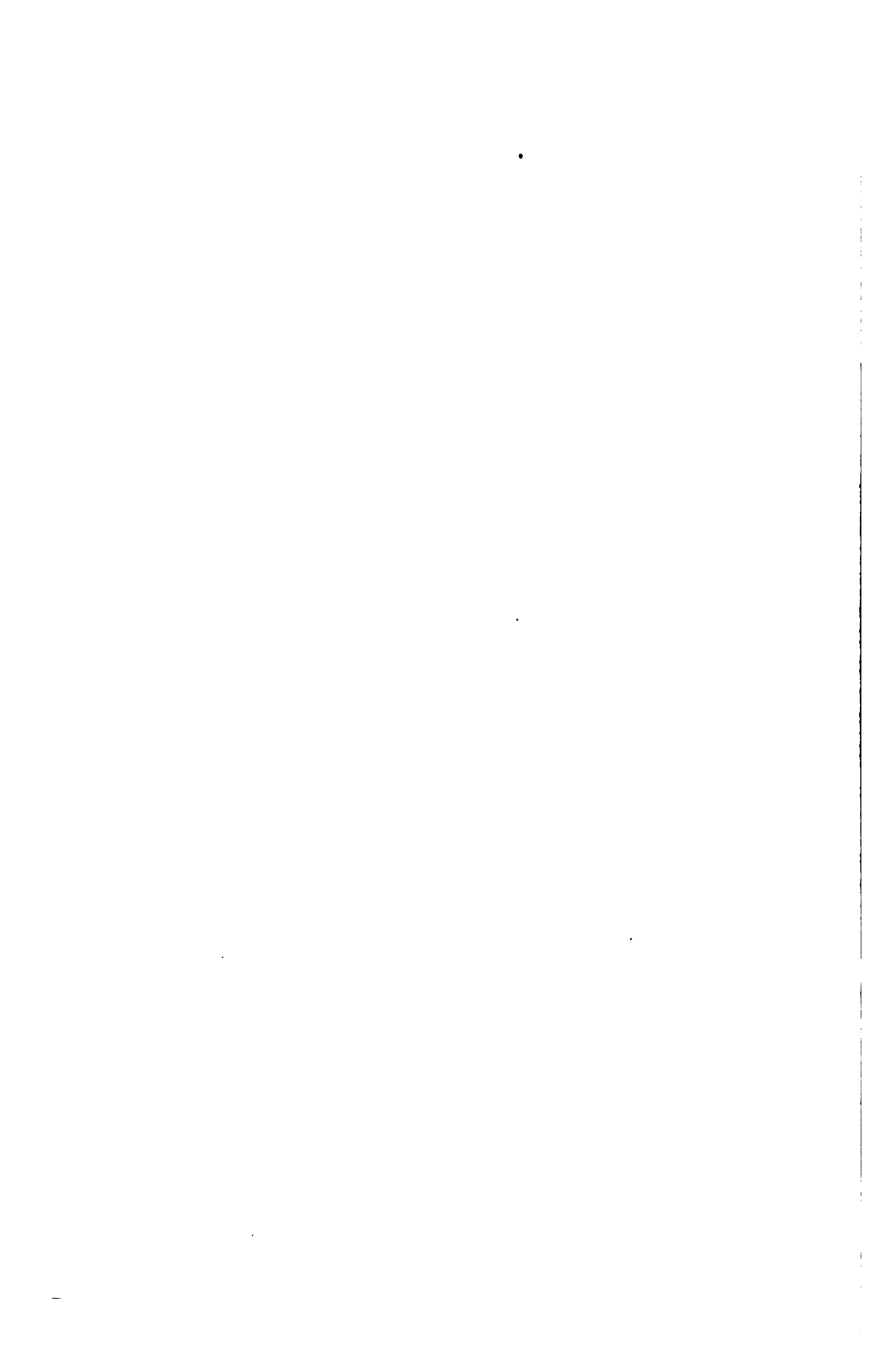
Let us briefly collate the expressions of the leading writers on international law, indicating their opinions as to the circumstances under which an arbitral sentence might be made the subject of attack.

Rivier in his *Principes du Droit des Gens*, Volume II, page 185, finds that the State against which sentence has been rendered may have just grounds for refusing execution if the compromis be null or extinct, if the arbitrators have been deceived, or have permitted themselves to be corrupted, if the sentence has been obtained by trickery, or is materially unjust, and, as is most frequently the case, he says, if the arbitrators have exceeded their powers or have not conformed to the directions of the compromis.

Taylor in his *International Public Law*, page 379, finds that—

If that expedient (proposition for equitable settlement) fails, then a definite award should be rendered, which has all the moral force of a judgment at law, provided that the procedure of which it is the culmination has been justly and legally conducted. It is generally admitted that the arbitral decision or award may be honorably disregarded when the tribunal has exceeded the powers conferred upon it by the articles of submission; when the award has been procured through fraud or corruption; when there has been a flagrant denial of justice; or when the terms of the award are equivocal. Bluntschli claims that it may also be disregarded "if the arbitral decision is contrary to international law. But the decision of the arbitrators can not be attacked under the pretext that it is erroneous or contrary to equity, save for errors of calculation."





Bonfils, in his *Droit International Public*, third edition, section 955, says:

Est-ce à dire que la sentence de l'arbitre sera toujours et dans tous les cas forcément obligatoire? Non assurément faut-il encore que la sentence soit valable en elle-même et régulièrement rendue. Les auteurs sont généralement d'accord pour reconnaître que la sentence arbitrale n'est point obligatoire: 1. Si les arbitres ont statué *ultra petita*; 2. Si l'une des parties n'a pas été entendue et mise à même de faire valoir ses moyens et ses preuves; 3. Si la sentence est le résultat de la fraude et de la déloyauté de l'arbitre. * * *

Monsieur Féraud-Giraud, in an essay upon *Traité d'Arbitrage Général et Permanent*, to be found in *Revue de Droit International* for 1897, page 333, finds that the majority of publicists have agreed in admitting several causes of nullity, but he does not specify in detail what he considers sufficient cause.

Heffter, in his *Droit International d'Europe*, Birgson's edition, page 210, says, in effect, that it may be attacked if rendered without a valid compromis or beyond its premises; if rendered by arbitrators absolutely incapable; if the arbitrator or other party has not acted in good faith; if the parties or one of them have not been heard; if it has been pronounced upon things not asked for, and if its provisions are contrary in an absolute manner to the rules of justice, and can not consequently form the object of an agreement; but he finds that errors which may be alleged against the sentence when they are not the result of a partial spirit do not constitute a cause of nullity, but nevertheless an error of calculation in the undertakings which he described under the name of "arbitratio," will justify a demand for rectification.

Phillimore says, Volume III, page 3:

It should be observed that if any arbitrator be appointed, the terms of the appointment will, of course, limit his authority, and if his award exceed or be inconsistent with those limits, it will be altogether null. * * *

The sentence, once given, is binding upon the parties whose own act has created a jurisdiction over them. The extreme case may be indeed supposed, of a sentence bearing upon its face glaring partiality, and attended with circumstances of such evident injustice as to be null. "Nec tamen (Voet observes), executioni danda erit, si per sordes, aut per manifestam gratiam vel inimicitiam probetur lata."

In an article entitled "De Certains Dangers de l'Arbitrage International," by Darras, contained in *La Revue Général de Droit International Public*, volume 6, page 547 (1899), the writer refers to a large number of authorities to support the contention that a sentence in which an arbitrator has determined upon points not submitted to him is a nullity.

In Hall's International Law, chapter 11, page 379, we find that:

An arbitral decision may be disregarded in the following cases, viz: When the tribunal has clearly exceeded the powers given to it by the instrument of submission; when it is guilty of an open denial of justice; when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal. Some writers add that the decision may also be disregarded if it is absolutely contrary to the rules of justice, and M. Bluntschli considers that it is invalidated by being contrary to international law; he subsequently says that nothing can be imposed by an arbitral decision which the parties themselves can not stipulate in a treaty. It must be uncertain whether in making this statement he intends to exemplify his general doctrine or to utter it in another form. Whatever may be the exact scope of these latter reserves, it is evident that an arbitral decision must for practical purposes be regarded as unimpeachable except in the few cases first mentioned, and that there is therefore ample room for the commission, under the influence of sentiment, of personal or national prejudices, of erroneous theories of law, and views unconsciously biased by national interests, of grave injustice, for which the injured State has no remedy.

Reenforcing the comments of Mr. Hall upon the position taken by Bluntschli, Mr. Geffcken remarks—

Que la partie condamnée par la sentence pourrait trop facilement prétendre que le jugement est contraire au droit international, ce serait perpétuer les conflits.

Halleck (chap. 4, sec. 11, p. 87), whose doctrines receive the approval of Ferguson in Volume II, Manual of International Law, p. 208, says—

But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating power as an arbitrator, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission.

Kamarowsky (Westman's edition, 1887, p. 348) in a note quotes M. Chrabro-Wassilewsky as saying:

La décision arbitrale étant obligatoire pour les deux parties pour les raisons signalées, elle ne saurait être méconnue à raison de motifs concernant la substance de cette décision.

Kamarowsky himself (Westman's edition, p. 355), after discussing the opinions of Vattel, Calvo, Heffter, Bluntschli, Fiore, Pierantoni, Bulmerincq, and Goldschmidt as to when findings of arbitrators may be attacked, says:

L'énumération des motifs de cassation que nous venons de reproduire épuise complètement la question. Nous pouvons, en résumé, les réduire aux trois points fondamentaux suivants:

1. La violation par le tribunal du compromis, sous quelque rapport que se soit.

2. La nonobservation des principes généraux et fondamentaux de la procédure, en général.

3. Une décision incompatible avec les principes du droit international.

Vattel says, section 329, book 2, chapter 18:

In order to obviate all difficulty and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence they should prove by incontestable facts that it was the offspring of corruption or flagrant partiality.

Calvo (sec. 1756) finds that the parties who have presented a demand to arbitration have submitted morally in advance and are held bound to execute the conclusions reached.

As grounds for attacking the judgment of an arbitral court he gives the following (sec. 1774):

1°. Si la sentence a été prononcée sans que les arbitres y aient été suffisamment autorisés, ou lorsqu'elle a statué en dehors ou au delà des termes du compromis. * * *

2°. Lorsqu'il est prouvé que ceux qui ont rendu la sentence se trouvaient dans une situation d'incapacité légale ou morale, absolue ou relative, par exemple s'ils étaient liés par des engagements antérieurs ou avaient dans les conclusions formulées un intérêt direct ignoré des parties qui les avaient choisis.

3°. Lorsque les arbitres ou l'une des parties adverses n'ont pas agi de bonne foi: si l'on peut prouver, par exemple, que les arbitres se sont laissé corrompre ou acheter par l'une des parties. Heureusement il serait difficile de mentionner un cas d'arbitrage ayant ce caractère dans nos temps modernes; depuis le commencement du siècle quarante différends internationaux au moins ont été réglés par des arbitres, et nous ne sachions pas qu'il se soit élevé le plus léger soupçon que leurs jugements n'aient pas été entièrement impartiaux. Il faut remonter jusqu'au moyen-âge pour rencontrer des exemples de fraude et de corruption; ainsi Pufendorf cite celui de l'empereur Maximilien et du doge de Venise soumettant leurs différends à l'arbitrage du pape Léon X, tandis que chacun d'eux intriguait en particulier auprès du pontife romain pour qu'il se déclarât en sa faveur.

4°. Lorsque l'un ou l'autre des États intéressés dans la question n'a pas été entendu ou mis à même de justifier de ses droits.

5°. Lorsque la sentence porte sur des questions non pertinentes, c'est-à-dire n'ayant pas trait au litige, ou sur des choses qui n'ont pas été demandées.

6°. Lorsque la teneur de la sentence est absolument contraire aux règles de la justice et ne peut dès lors faire l'objet d'une transaction, comme dans le cas où l'arbitre, appelé à prononcer sur la satisfaction qu'un État doit à un autre pour une offense, condamnerait l'offenseur à une réparation qui porterait atteinte à son honneur ou à son indépendance; ou bien encore dans le cas où l'arbitre aurait en vue quelque avantage qu'il pourrait tirer d'une décision injuste, et serait assez puissant pour ne craindre pas le ressentiment des parties qui ont déféré à son jugement le règlement de leurs réclamations en litige: ainsi fut la décision du peuple romain, lorsque les villes italiennes d'Ardée et d'Aricie ayant remis à son arbitrage leur contestation au sujet de la souveraineté sur un certain territoire, l'assemblée des tribus romaines adjugea à l'État romain la propriété du territoire contesté.

Il convient de faire observer que la décision des arbitres ne saurait être attaquée pour un simple vice de forme, sous le prétexte qu'elle est erronée, ou contraire à l'équité, ou préjudiciable aux intérêts de l'une des parties. Néanmoins les erreurs de calcul et du reste toutes les erreurs de fait constatées peuvent toujours être rectifiées.

According to M. Pradier-Fodéré (sec. 2628), an arbitral sentence is null if it is in derogation in any respect whatever of the terms of the compromis, or if the universal or fundamental principles of procedure have not been observed, or if there has been partiality on the part of the arbitrator or bad faith on his part or on the part of the parties, or if the decision is absolutely incompatible with the principles of justice and international law.

According to M. Goldschmidt, the arbitral sentence duly pronounced can be attacked and held for naught (*Revue de Droit International* for 1874, p. 447):

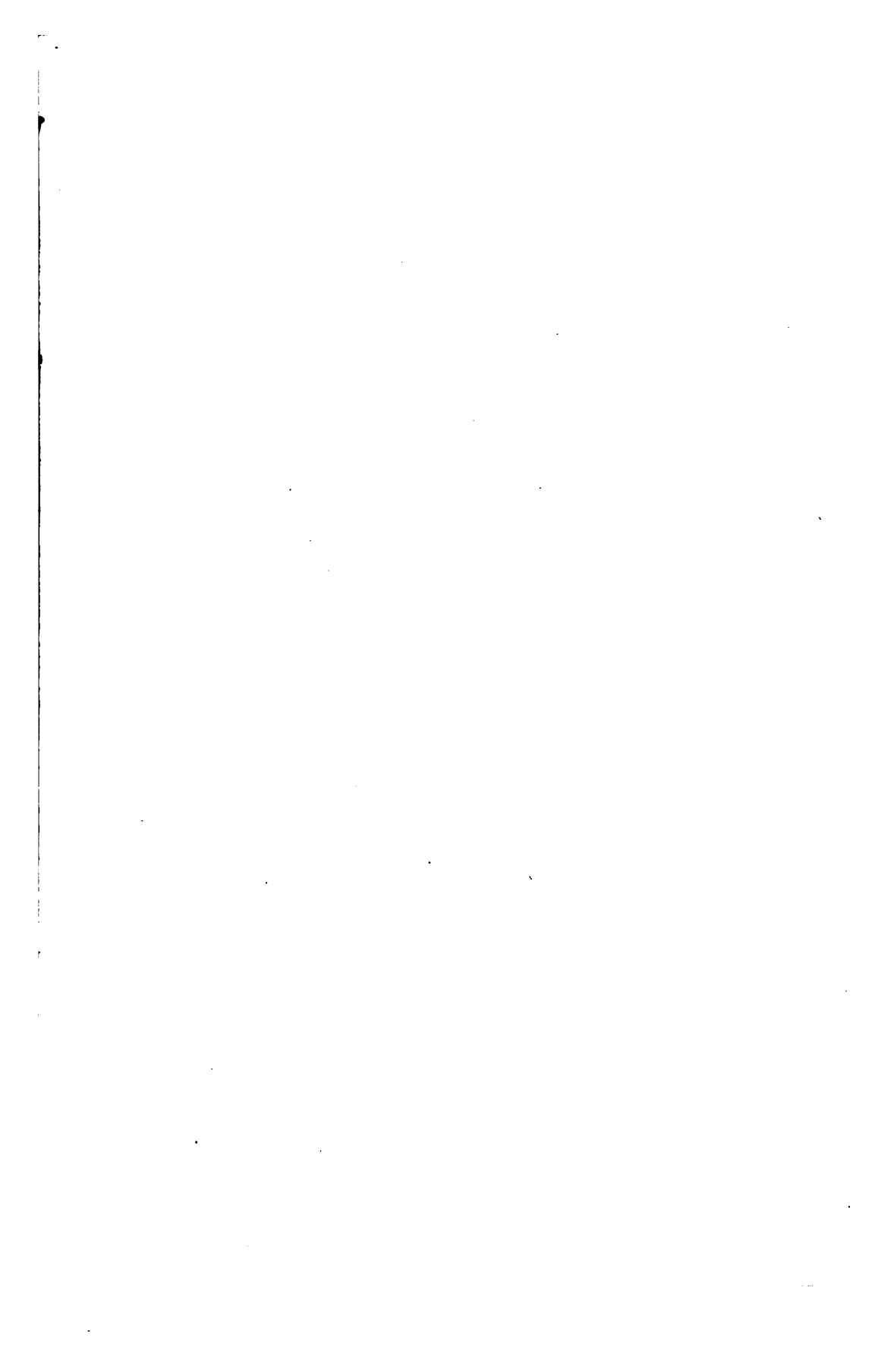
1°. Si le compromis n'a pas été conclu valablement. Ce motif ne peut être invoqué si le recourant a pris part à la procédure devant le tribunal arbitral, sans opposer la nullité du compromis.

2°. Si le compromis valablement conclu s'est ensuite éteint: *a*, par convention des parties intervenue avant le prononcé de la sentence; *b*, parce qu'on n'a pas pu former le tribunal arbitral, ou parce que le tribunal arbitral valablement formé s'est ensuite dissous; *c*, parce que le délai prescrit pour le prononcé de la sentence est expiré avant ce prononcé.

3°. Si le tribunal arbitral n'a pas délibéré et statué tous les membres présents et votants.

4°. Si, le compromis prescrivant l'exposé des motifs, la sentence a été rendue sans motifs.

5°. Si le tribunal arbitral a décidé sans aucunement entendre le recourant. Est assimilé au cas de refus d'audition celui où la personne qui s'est gérée en représentant du recourant n'en a



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reçu mandat ni exprès ni tacite, sa gestion n'ayant été non plus ratifiée ni expressément ni tacitement par le recourant.

6°. Si le tribunal arbitral a excédé les limites de la compétence que lui donnait le compromis.

7°. Si le tribunal arbitral a, par sa décision, accordé à la partie adverse plus qu'elle ne demandait.

8°. Si les règles de procédure ou les principes de droit expressément prescrits à l'observation du tribunal arbitral dans le compromis ou une convention subsequente des compromettants, ou les principes de procédure posés par le tribunal lui-même et notifiés aux parties, ont été manifestement négligés ou violés.

9°. Si la sentence arbitrale ordonne un acte reconnu généralement pour immoral ou prohibé.

10°. Si, à l'insu du recourant et avant le prononcé de la sentence, un des arbitres a reçu de la partie adverse un avantage ou la promesse d'un avantage.

11°. S'il est établi que le tribunal arbitral a été trompé par la partie adverse, par exemple, au moyen d'actes faux ou altérés ou de témoins corrompus.

Summing up the various grounds for supposed just denial of the authority of the decisions of arbitral courts, we find that many relate to questions of departure from the terms of the compromis, and others to the exercise, or attempted exercise, by the arbitrators of powers beyond those conferred upon them by that instrument, although to the latter point the writers instance but a single case, such being the action of the King of Holland in connection with the arbitration between England and America for the settlement of the St. Croix River difficulty, before referred to.

The authors are further in substantial accord to the point that the decision may be rejected on the ground of partiality, bad faith, or corruption, but fortunately again in the history of arbitrations no instance is cited of partiality or bad faith, and but one of attempted corruption.

According to some writers, the award may be rejected when contrary to the principles of international law, but unless this expression be given a narrow interpretation this opinion may be regarded as doubtful and dangerous. Properly interpreted, it may be esteemed as referring to cases where the award would involve, without its express consent, the territorial impairment or the infringement of the independence of a state.

Writers generally agree that an award may be attacked for errors of calculation, but the good faith of nations, of course, permits corrections of this sort to be made without involving serious trouble, and the point may be dismissed as of minor importance.

It is to be noted that—the point being considered by him—no author believes that the award of arbitrators may be attacked because of erroneous appreciation either of the facts or of the law as applicable

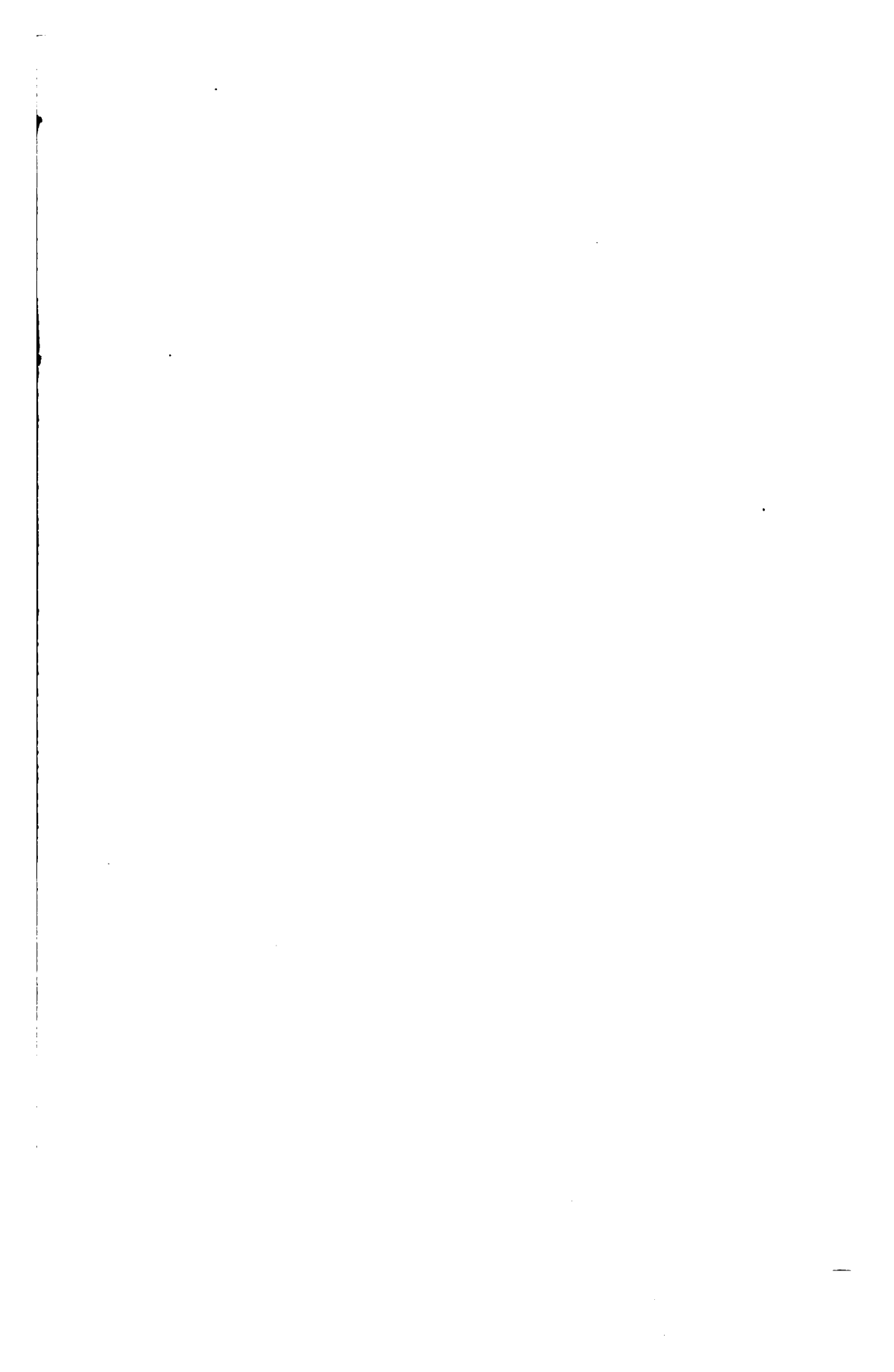
to them. We have seen that upon this point Bluntschli argues that a decision may not be attacked on the pretext that it is erroneous or contrary to equity, save for errors of calculation; while Heffter finds that errors which may be alleged against the sentence, when they are not the result of a partial spirit, do not constitute a cause of nullity. Kamarowsky quotes Chrabro-Vassilewsky as contending that the effect of an arbitral sentence can not be lost on account of reasons affecting its substance. Vattel declares that the parties may not say "it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators." Calvo is of the opinion that the decision of arbitrators can not be attacked on the pretext that it is erroneous or contrary to equity or prejudicial to the interests of one of the parties.

It is true that, in the opinion of the Institute of International Law, arbitral sentences may be disputed for "*erreur essentielle*." We have already adverted to the possibility that these words are to be interpreted with reference to the original "*projet*" of Goldschmidt, and intended to refer to the production of false documents; but if this meaning be not given the words, then we must understand by "*erreur essentielle*" a fundamental error—one which is of the nature known to the common law as jurisdictional, and therefore vitiating the whole proceedings, and not such error as might arise from a miscitation of the facts or misapplication of the law of the particular case. It must be, in other words, such an error as is criticised by some authors as constituting an infraction of public international law, which subject we have already briefly discussed.

The distinction can not be too strongly emphasized between errors involving a subversion of what we might term natural law of nations and errors which rest upon matters of judgment, with relation to which men may differ, and which are only regarded among men and nations as set at rest by the judgment of a competent tribunal. That the decision under consideration was subversive in any degree of the fundamental principles of international law we think can scarcely be contended.

That Mexico will insist that the former arbitrators erred in their appreciation of the facts submitted to them seems probable, but that such a contention is sufficient to justify the rejection of an award can not, we think, in view of the foregoing considerations, be sustained from the standpoint either of law or reason.

We do not believe it can or will be seriously argued that Mexico was bound by the decision formerly had, in so far as that decision related to the payment of the sum of \$900,000, but would not be bound for any other consequences to flow therefrom. It will not do, we think, to say that while Mexico was bound to abide by the former decision and pay the award then rendered, nevertheless the conse-



quences which might naturally flow from such award, constituting *res judicata*, may not follow. If the former award was valid, then it may not be invalid as to the incidents attaching to it.

It is to be noted that the new protocol does not authorize this court to review or revise in any manner the judgment of the former Mixed Commission, but to determine whether it is *res judicata* of the matters at issue, and what are the consequences of its being *res judicata*, and if it be not *res judicata*, then what are the merits of the claim submitted to this court. This very statement emphasizes that a revision of the former adjudication is not one of the things asked at your hands, and further implies that, except there be such fundamental error attaching to the former award as absolutely vitiates it, then its conclusions are to be given their full force and effect, whatever such force and effect may be, which subject we reserve for later discussion.

MEXICO'S OFFICIAL VIEW OF THE SANCTITY OF THE AWARD OF THE MIXED COMMISSION.

Reference to the diplomatic correspondence between the United States and Mexico, occurring at the close of the year 1876, demonstrates the fact that Mexico did not consider the award in this case properly attackable. Sr. Mariscal stated that Mexico did not "pretend to put in doubt the present award," and his correspondence shows that although Mexico sought to minimize its future effect, she did not nevertheless deny its absolute sanctity.

If Mexico had at any time intended to question or thought there was reasonable ground for questioning the jurisdiction of the former tribunal, surely it would have been at such a moment as this, but she merely denied the right to claim the capital upon which the interest then awarded was based. Our position in this respect is all the stronger, because, believing that the Weil and La Abra awards were obtained by fraud, Mexico expressed certain hopes of a reconsideration as to them. Again, we believe that recognizing, as the Mexican commissioner did, that the award would place upon Mexico "the perpetual tribute of a rent," the Mexican Government, had it conceived that there was vital error in the award itself would not have failed to note the fact, and to announce its intention of future resistance. Instead of such an attitude being assumed, we are left simply to infer that the only position taken by Mexico was that any claim for the capital which might thereafter be made would be opposed, and possibly that the contention would be made that the award then obtained amounted to a conclusive settlement of the whole transaction, although as to this latter suggestion, the view of Mexico was not clearly defined.

Considering the point last above mentioned we believe we might well have waived all of the argument up to this point and limited ourselves to the questions we are about to discuss, for if Mexico immediately

upon the rendition of the decision of the umpire did not contend, as we have endeavored to show she could not, that the award was contrary to public international law, or was based upon errors of law or of fact, or was vitiated or inoperative for some other reason, surely, now, after a lapse of twenty-six years, and without the discovery of any new fact affecting the sanctity of the former adjudication, which new fact was not at that time discoverable, Mexico will not be permitted to attack as invalid the finding of the Mixed Commission.

We may with propriety at this point quote Lord Cairns, who, in *Dundas v. Waddell* (5 Appeal Cases, 263), said:

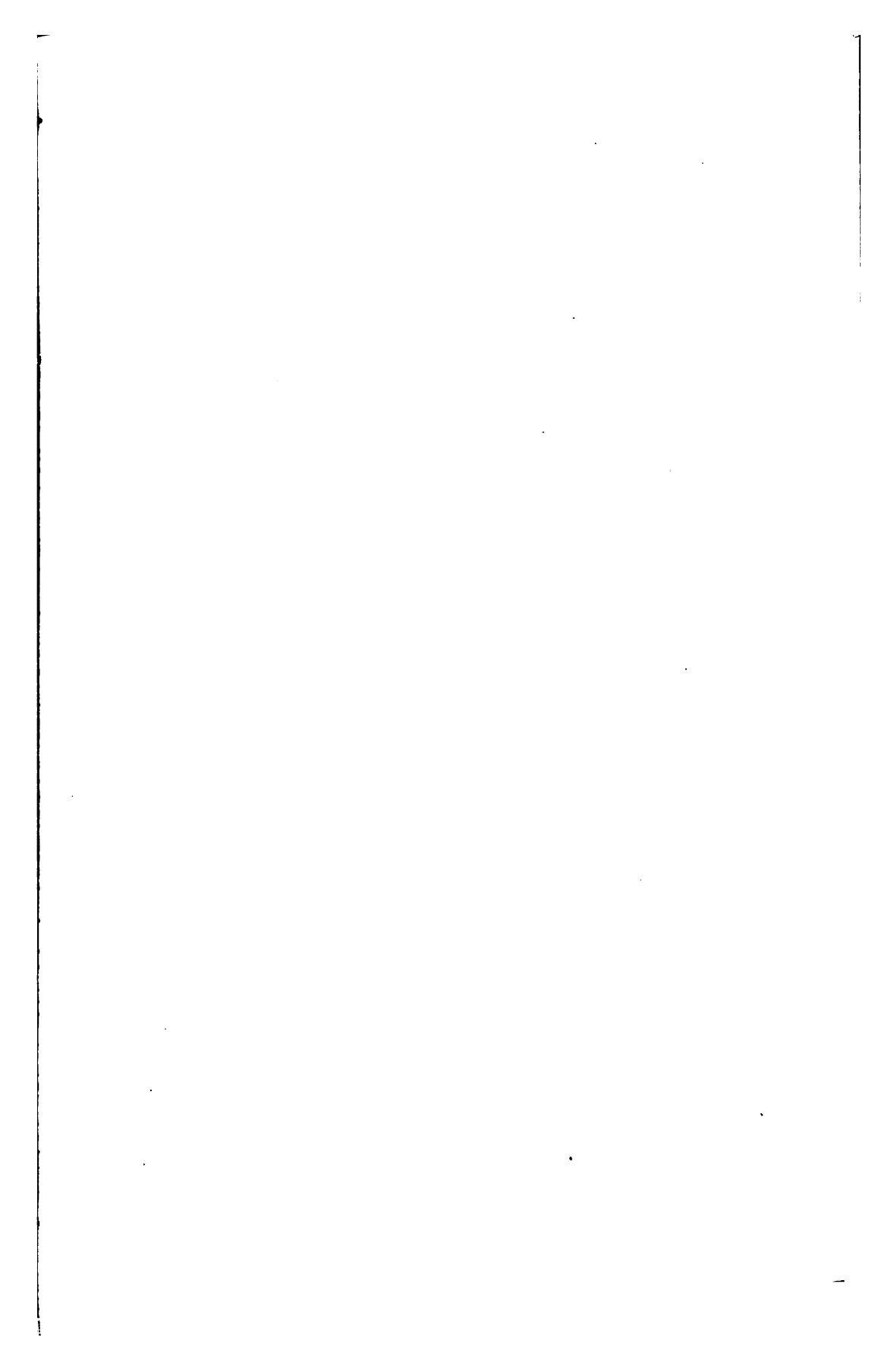
I can not imagine anything more unsafe than to attempt to cut down the effect of judgments, distinct and absolute on the face of them, on a surmise that a case was imperfectly considered, or that the court had not proper materials for a judgment. Especially does it appear to me unsafe to enter on such speculations after the lapse of nearly a century, when every source of information, except what is retained in the judgment, has been dried up by lapse of time.

THE EFFECT OF THE ARBITRAL DECISION IN THIS CASE AS RES JUDICATA.

By reference to the protocol it will appear that the former Mixed Commission adjudged the claim of the Catholic bishops of California submitted to it adversely to the Republic of Mexico, and made an award thereon of \$904,700.99, the same being, as expressed in the findings of the court, for twenty-one years' interest of the annual amount of \$43,080.50 upon \$718,016.50 in Mexican gold. Subsequently this award was reduced, because of an error of calculation, to \$904,070.79 Mexican gold, representing a diminution in the total amount of principal upon which interest should be recovered of \$500. (Transcript, p. 650.) This award was paid, and in view of the demonstration in which we believe we have successfully indulged of the fact that the former award constituted *res judicata* as to the amount of yearly installments which could be claimed on behalf of the bishops of California, the question arises as to the consequences which flow therefrom. We have introduced in evidence the former adjudication for the purpose of establishing conclusively the amount of yearly interest we now have a right to claim. This done, Mexico would still be privileged to show, if such were the fact, that the interest had been paid. The protocol admits that this interest has not been paid or released.

Before entering into a discussion of the legal consequences of the former decision, it is worth noting the opinion expressed at the time of its rendition by the representatives of Mexico. Said Señor de Zamacona, in his opinion as commissioner:

When Mexico and the United States liquidated, so to say, their accounts in 1848, binding themselves not to seek in the past for any cause of complaint or reclamation, the Fund of





California was already incorporated into the national revenues of the Republic, and the Government of Mexico had only allotted certain subsidies to the ecclesiastical functionaries who served it as auxiliaries in that part of the confederacy. This situation the claimants now desire to alter *and to oblige Mexico to pay the perpetual tribute of a rent to certain American corporations.* (Transcript, p. 542.)

Again, he asks:

What is there in common between that case and that of the claimants? What do they give Mexico? What do they offer her in exchange for a sort of *perpetual annuity* which they want to secure in favor of their churches? (Transcript, p. 543.)

For citations to similar effect from the argument of Sr. Avila, we refer to the brief of the Messrs. Doyle, where they are collated.

It is evident that Señor de Zamacona believed that an award against his country for past interest necessarily involved the payment of future interest, which he terms "the perpetual tribute of a rent," or in other words, "a perpetual annuity. His view of the law upon this point was absolutely correct, as we shall now proceed to show.

THE FORMER AWARD BEING RES JUDICATA ESTABLISHES CONCLUSIVELY
THE ANNUAL AMOUNT OF INTEREST TO BE PAID.

By reference to the protocol we find the recital that in the former controversy the Mixed Commission—

adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand seven hundred and $\frac{9}{100}$ (904,700.99) dollars, the same, as expressed in the findings of said court being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and $\frac{9}{100}$ (43,080.99) dollars upon seven hundred and eighteen thousand and sixteen and $\frac{5}{100}$ (718,016.50) dollars.

A slight correction is properly to be made in the foregoing as above indicated, inasmuch as the umpire, upon his attention being called to an arithmetical error, reduced the sum total to \$904,070.79.

The language of the protocol above quoted indicates that by agreement of the two nations it is covenanted that the former tribunal adjudged not only the annual interest to be paid, but also the amount of principal upon which it was based, and we might well rely upon this single fact as a complete answer to the suggestion on behalf of the Mexican Republic that the decisory or *dispositif* part of the judgment had reference only to the question of interest.

But for a few moments, even though it be contrary to the actual facts of the situation, let us assume that the two Governments have not agreed as to the points upon which the decision was reached, and further assume that it is open to this court to investigate and rede-

Rule in law courts that error in exercise of jurisdiction
does not affect competency of writ. Chaud. p. 483.
Error in judgment does not render it void. Chaud. p. 482

reçu mandat ni exprès ni tacite, sa gestion n'ayant été non plus ratifiée ni expressément ni tacitement par le recourant.

6°. Si le tribunal arbitral a excédé les limites de la compétence que lui donnait le compromis.

7°. Si le tribunal arbitral a, par sa décision, accordé à la partie adverse plus qu'elle ne demandait.

8°. Si les règles de procédure ou les principes de droit expressément prescrits à l'observation du tribunal arbitral dans le compromis ou une convention subseuente des compromettants, ou les principes de procédure posés par le tribunal lui-même et notifiés aux parties, ont été manifestement négligés ou violés.

9°. Si la sentence arbitrale ordonne un acte reconnu généralement pour immoral ou prohibé.

10°. Si, à l'insu du recourant et avant le prononcé de la sentence, un des arbitres a reçu de la partie adverse un avantage ou la promesse d'un avantage.

11°. S'il est établi que le tribunal arbitral a été trompé par la partie adverse, par exemple, au moyen d'actes faux ou altérés ou de témoins corrompus.

Summing up the various grounds for supposed just denial of the authority of the decisions of arbitral courts, we find that many relate to questions of departure from the terms of the compromis, and others to the exercise, or attempted exercise, by the arbitrators of powers beyond those conferred upon them by that instrument, although to the latter point the writers instance but a single case, such being the action of the King of Holland in connection with the arbitration between England and America for the settlement of the St. Croix River difficulty, before referred to.

The authors are further in substantial accord to the point that the decision may be rejected on the ground of partiality, bad faith, or corruption, but fortunately again in the history of arbitrations no instance is cited of partiality or bad faith, and but one of attempted corruption.

According to some writers, the award may be rejected when contrary to the principles of international law, but unless this expression be given a narrow interpretation this opinion may be regarded as doubtful and dangerous. Properly interpreted, it may be esteemed as referring to cases where the award would involve, without its express consent, the territorial impairment or the infringement of the independence of a state.

Writers generally agree that an award may be attacked for errors of calculation, but the good faith of nations, of course, permits corrections of this sort to be made without involving serious trouble, and the point may be dismissed as of minor importance.

It is to be noted that—the point being considered by him—no author believes that the award of arbitrators may be attacked because of erroneous appreciation either of the facts or of the law as applicable

The language of the court of appeals of New York in the case of *Manufacturing Company v. Walker*, 114 New York, 7, is much in point:

The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, were comprehended and involved in the thing expressly stated and decided, whether they were or not actually litigated or considered. It is not necessary that issue should have been taken upon the precise point controverted in the second action.

In passing to a brief consideration of the position of the English courts, we may refer to the fact that in *Cromwell v. County of Sac*, (4 Otto, Supreme Court U. S., 351) the Supreme Court quotes approvingly the opinion of the chancellor in *Henderson v. Henderson* (3 Hare, Eng., 100) as follows:

In trying this question I believe I state the rule of court correctly that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward only because they have from negligence, inadvertence, or even accident omitted part of the case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

The general rule is again indicated by the language of Lord Mellish in *Bank of Hindustan, China, and Japan, Allison's case* (L. R. Ch. Appeal Cases, vol. 9, p. 1), as follows:

It is clear, I apprehend, that the judgment of the courts of common law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered.

As supplying us with a general rule, the application of which is explained by the cases already given, and those hereafter to be adduced, we may with advantage refer to the much cited opinion of Lord De Grey in *The Duchess of Kingston's case* (20 Howell's State Trials, 538), as follows:

From the variety of cases relative to judgments being given in evidence in civil suits these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as

evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose.

Let us now consider whether the civil law treats this subject-matter in the same manner, bearing in mind the citation made by Señor Mariscal (Diplomatic Correspondence, p. 32) from the work of Professor Laurent to the effect that—

The creditor sues his debtor for interest of a principal sum; the judge condemns the debtor to pay. Is there *res judicata* in respect to the principal? It is supposed that the decisory part of the decision affects the amount of the principal, and it has been decided that a decision in these terms does not give the force of *res judicata* with respect to the principal itself. (Citing decision August 25, 1829, Dalloz, Chose Jugée, No. 24.)

When, however, we examine the work of Dalloz itself, we find that the citation was simply that of a case in which judgment for compound interest had been rendered by default, and Dalloz contended that the authority of *res judicata* did not attach to the points or reasons announced in connection with the judgment relative to facts or questions which had not been specially submitted to the examination of the judge, even if these announcements were found in the "*dispositif*" of the judgment. Thus he continues:

Judgment by default which results from a demand tending solely to produce interest upon interest of a capital has not the effect of *chose jugée* as to the quantity of the capital, although this capital may be expressed in the judgment.

Looking at the reason suggested, we may readily grant the conclusion. No question as to the amount of the capital was "specially submitted to the examination of the judge." He was only asked to determine the amount of interest accruing upon another alleged amount of interest, and the judgment in the case being by default, there was no contest before him tending to bring out all the facts of the case. That we have correctly stated the reason for the position taken by Dalloz sufficiently appears from a further citation from paragraph 32, in which Señor Mariscal found the quotation applied by him. There M. Laurent says:

Un jugement accorde à une personne des aliments en qualité d'enfant, A-t-il l'autorité de chose jugée sur la question d'affiliation? Si la question a été débattue entre les parties l'affirmative n'est point douteuse.

Let us apply the last citation to the case at issue. Mexico discussed fully before the former tribunal the question of her obligation to pay the interest finally awarded against her, and the finding of the tribunal

That authority of res judicata does not apply to
dispositif alone, see Lawrence cited by Chaudhry 131, 132

was contrary to her contentions. The question, therefore, of her liability to pay interest "*a été débattue entre les parties,*" and according to M. Laurent the question of *res judicata* under such circumstances "*n'est point douteuse.*"

As a preliminary question we may say that the civil law has determined that the authority of *chose jugée*—

Pouvant être invoquée par le demandeur aussi bien que le défendeur, n'est pas toujours invoquée sous la forme d'une exception. (Répertoire Général Alfabétique du Droit Français, vol. 11, Chose Jugée, sec. 767.)

Addressing ourselves now to the underlying principle to which we are giving consideration, we read from the Dictionnaire Général de Droit et de Jurisprudence de M. Bertheau, in sec. 15535, as follows:

Il y a des motifs qui sont en quelque sorte l'âme de la sentence, qui sont avec elle dans un rapport si étroit qu'ils participent nécessairement à l'autorité attachée au dispositif. Exemple: vous me demandez le paiement d'une somme de tant. Je vous oppose la compensation; mais le jugement, écartant mon moyen de défense dans ses motifs, me condamne, dans son dispositif, à vous payer la somme réclamée. Je ne pourrais ensuite vous demander ladite somme que je prétends m'être due par vous, car il résulte des motifs du jugement que vous ne me la devez pas. On voit donc qu'ici les motifs ont indirectement autorité de chose jugée, parce qu'ils se trouvent avoir un lien nécessaire avec la sentence.

Again he says:

§ 15537. Les décisions formellement exprimées dans le jugement ne sont pas les seules qui bénéficient de la présomption de vérité. Il en est de même de celles que le jugement implique nécessairement, sans les déclarer cependant d'une façon expresse.

§ 15538. Ainsi le jugement qui valide les poursuites dirigées en vertu d'un titre implique que le titre est valable. V. M. Demolombe, XXX. No. 294; Cass., 4 dec. 1837. (S. 38. 1. 233.)

Continuing our citations, we beg to refer to Répertoire Général Alfabétique du Droit Français (vol. 11, title "*Chose Jugée,*" sec. 213), which says:

L'autorité de la chose jugée ne s'attache pas dans une sentence à toutes les paroles du juge; elle ne s'attache pas en principe aux motifs du jugement; elle ne s'attache pas non plus aux énonciations; mais elle appartient aux décisions implicites aussi bien qu'aux décisions expresses.

In the same line is the expression found, under the same title, in section 228, which reads:

D'autre part, alors même que le dispositif contient tout ce qui a été décidé, les motifs d'un jugement peuvent servir à

éclairer le *dispositif*. Ce dernier est souvent très bref et ne ferait pas suffisamment connaître ce qui a été jugé. On peut, pour compléter le sens d'une décision et déterminer la chose jugée par elle, en interroger les motifs lorsqu'ils sont en harmonie avec le *dispositif*.

Again, we add from section 237:

* * * Aussi les décisions implicites sont-elles admises par la jurisprudence et par tous les auteurs. (Aubry et Rau, t. 8, p. 371, s. 769; Larombière, art. 1351, n. 27; Laurent, t. 20, n. 34; Demolombe, t. 30, n. 294; Garsonnet, t. 3, p. 240, s. 465, n. 13.)

Volume 25 of the same work, title "Jugement et Arrêt," section 392, says:

La règle que l'autorité de la chose jugée ne s'attache qu'au *dispositif* du jugement ne s'oppose pas toujours à ce que les motifs fassent partie de la décision définitive; les motifs participent à l'autorité de la chose jugée lorsqu'ils font corps avec le *dispositif*, ou qu'ils en sont la base essentielle. (V. *supra*, V° Chose Jugée, n. 226 et s.)

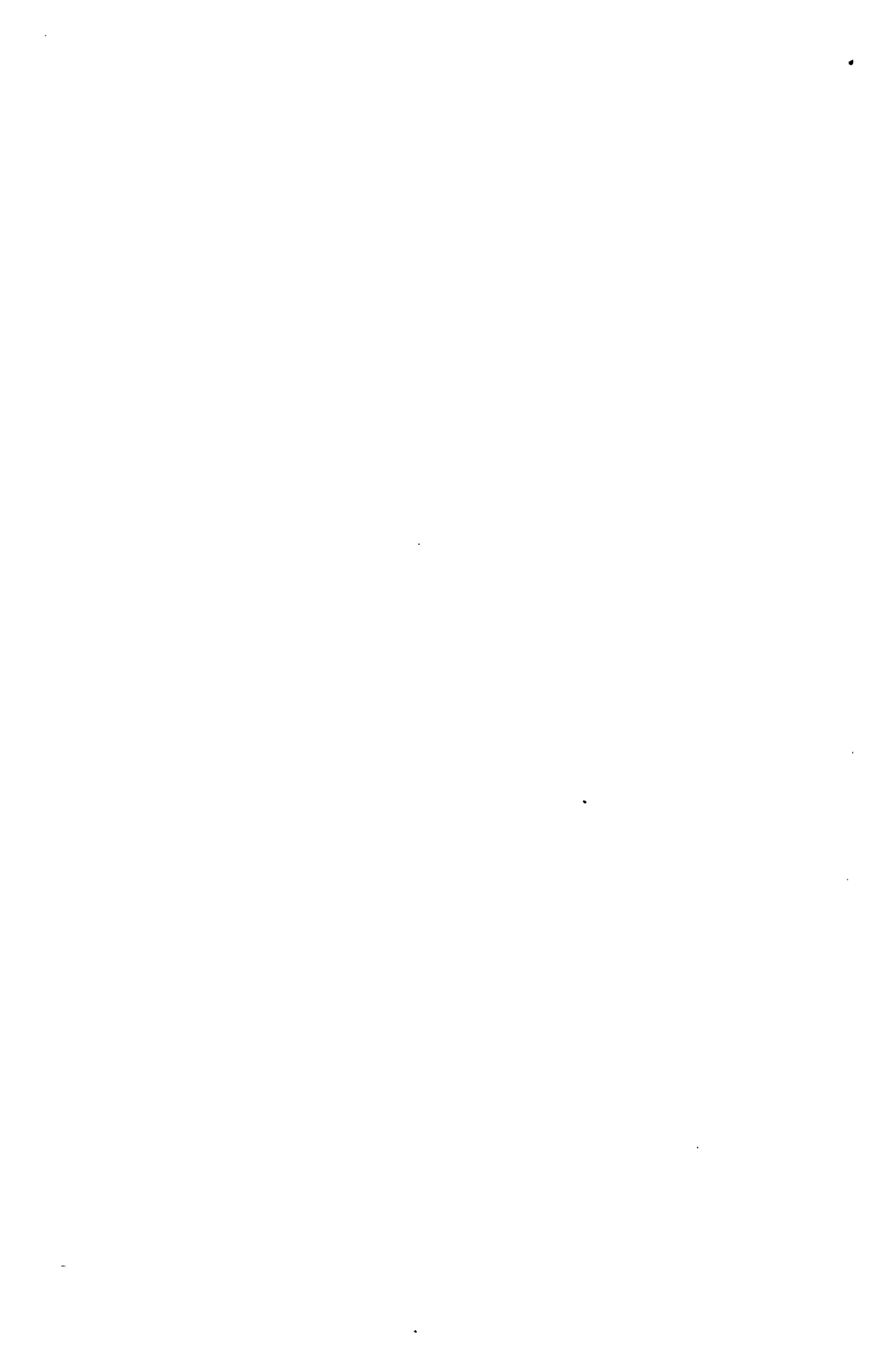
We find, therefore, that the common law and the civil law agree that the thing which is implied from the actual point of the decision, or which constitutes its necessary foundation (*base essentielle*), is as much a part of the *dispositif* or decisory part of the decision as if it had been fully expressed and had entered into its operative words. Let us now, having established this principle, see the effect which has been given it by American, English, and civil law judges, and the extent to which in practice it has been carried.

Our contention is, of course, that the foundation of the principal sum, having been examined thoroughly by the Mixed Commission, and that commission having determined the existence and amount of the principal, and as a consequence the quantity of interest flowing therefrom, has settled all of these questions for all time to come.

An American case in point would be that of *Edgell v. Sigerson* (26 Missouri, 583), in which case, after judgment in favor of plaintiff upon a contract for the payment of money in installments, it was held that the only question open to litigation in respect to any subsequent installments was whether as to it the defendant was in default. The court in deciding the case used this language:

The integrity of the note was necessarily and directly in issue in the suit brought to recover the annual installments of interest, and the judgment in that case having been rendered by a court of competent jurisdiction determined the question as to the alteration of the note and was conclusive between the same parties in another suit directly involving the same question.

A like decision has been made where a series of promissory notes had been given and prior litigation had been had with reference to one of them; for instance, in *Meiers v. Purrier* (21 Illinois Appeals, 551)



the court held, in an action on the third of three notes given at the same time for the same consideration and as part of the same transaction, the record of a former suit on the other notes was admissible and conclusive of the partnership of the makers, which had then been in issue.

Again, in the case of *Young v. Brehe* (19 Nevada, 379; 3 American State Reports, 892; 12 Pacific Reporter, 564), it was held that where defense is interposed in a suit on a note that defendant made and executed to plaintiff a deed of land which was accepted in full payment of the note sued on and other notes due from the defendant to the plaintiff, the record of an action by the same plaintiff against the same defendant on one of the other notes, in which the same defense was made, and where it was decided that the deed was never delivered and accepted by defendant as alleged, was conclusive against the defendant in that action.

The courts have taken a similar position, the principle being the same, in cases involving the payment of successive installments. We will refer at this time simply to the case of *Hobbs v. Sherman* (42 New York Superior Court; 10 Jones and S. 477), wherein a recovery in an action for the first installment under a contract calling for payment by installments was held conclusive as to the existence and validity of the contract in a subsequent action for other installments.

Rent cases are comparatively numerous. We will commence by referring to that of *Love v. Waltz* (7 California, 250), wherein it was held that judgment for a quarter's rent under a lease is conclusive evidence, so far as it goes, in an action of forcible entry for nonpayment of another quarter's rent under the same lease between the same parties. Of course, it would not in itself be evidence conclusive of the existence of a subsequent lease or of actual payment or nonpayment under the latter.

See also *Kelsey v. Ward*, 38 New York, 83; *Tysen v. Tompkins*, 10 Daly, 244; *Drydock, etc., Railroad Co. v. N. and A. Railroad Co.*, 22 New York Supplement, 556.

The doctrine of the cases last above mentioned is recognized in *re Johnson* (4 Court of Claims, 248), wherein it was held that a judgment of the Court of Claims, determining the annual rental value of private property of which the United States has possession, is conclusive on the claimant as to the measures of damages for occupation subsequent to its date.

The general underlying principle receives full application in the case of *Empire State Nail Co. v. American Solid Leather Button Co.* (74 Federal, 864; 21 C. C. A., 152; 33 U. S. Appeals, 520), wherein the view was taken that where it appears of record that in a prior suit any particular question has been actually adjudicated, the prior judgment is to that extent conclusive in any subsequent suit between the same

parties or their privies relating to an instrument which forms the basis of the litigation in each.

The doctrine is fully recognized in the case of *New Orleans v. Citizens' Bank* (167 U. S., 371) wherein on page 398, the court said:

It follows then that the mere fact that the demand in this case is for a tax for one year does not prevent the operation of the thing adjudged, if in the prior case the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

The case last quoted from cites with approval the opinion of Justice Cooley in his work of *Constitutional Limitations*, wherein on page 47, he declares that—

The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the case, and was determined therein.

We may close our citations of American authorities by referring to the case of *Black River Savings Bank v. Edwards* (10 Gray, Mass., 387), in which the position was taken by the court that recovery by judgment of a sum claimed to be due as interest on a promissory note precludes the defendant from contesting the payment of the principal on the ground that the note was procured by fraud.

For a complete review of the positions taken by the text writers with relation to this subject, we beg leave to refer to the comprehensive brief of Mr. Doyle, to be found on pages 12 et seq., *Diplomatic Correspondence*.

In a brief prepared last year by Messrs. Ralston & Siddons, in reply to a letter of Señor Mariscal, and given in full in the *Diplomatic Correspondence*, pages 51 et seq., this subject is further discussed from the standpoint of the civil law.

To the citations already given from the civil law others of importance remain to be added. We quote from *Répertoire Général Alphabétique du Droit Français* (vol. 11, title "Chose Jugée"):

§ 255. Je réclame à titre d'héritier le paiement d'une dette; mon adversaire prétend qu'il est l'héritier du défunt et que, par suite, la confusion a éteint la dette dont il était tenu. Le tribunal déclare que c'est moi qui suis l'héritier, et condamne, en conséquence, le défendeur à verser entre mes mains la somme que je lui ai réclamée. Si plus tard j'agis de nouveau, contre la même personne, pour lui réclamer une maison dépendant de la succession, elle ne pourrait pas être admise à contester ma qualité d'héritier; je suis en droit de soutenir qu'il y a dans les deux procès identité d'objet. Il est vrai que dans le premier procès j'ai réclaté une somme d'argent, et que, dans le second, je réclame une maison; mais les deux procès ont mis en jeu un même droit, mon droit héréditaire; les deux instances ont, en réalité, le même objet. (Bonnier, n. 869; Larombière, art.

1351, n. 86; Colmet de Sauterre, t. 5, n. 328, bis-VI; Demolombe, t. 30, n. 303; Garsonnet, t. 3, p. 251, sec. 467; Griolet, p. 104.)

§ 256. Il a été jugé, en ce sens, que le jugement rendu au sujet d'un des intérêts divers qui se fondent sur une question d'état a l'autorité de la chose jugée, en ce qui concerne l'état contesté, quant aux autres prétentions qui, reposant sur la même base, pourraient ultérieurement se produire. (Paris 1^{er} juill. 1861, Patterson (S. 62. 2. 71; P. 61, 1153; D. 61. 2. 137.) Sic, Aubry et Rau, t. 8, p. 399, sec. 769, texte et note 113; Larombière, art. 1351, n. 85.

We think the following section excellently states the underlying idea, and, accepting it, we submit that the tribunal before which we have the honor to appear must give full force and effect to the prior decision as *res judicata*:

§ 258. En un mot, l'idée qui doit servir de guide pour savoir, s'il y a ou non identité d'objet est la suivante: en statuant sur l'objet d'une demande, le juge est-il exposé à contredire une décision antérieure en affirmant un droit nié, ou en niant un droit affirmé par cette précédente décision? S'il ne peut statuer qu'en s'exposant à cette contradiction, il y a identité d'objet et chose jugée. (Marcadé, art. 1351, n. 4; Demolombe, t. 30, n. 299; Baudry-Lacantinerie, t. 2, n. 1289.)

Continuing our citations of illustrative cases, we quote sections 259 and 260:

§ 259. Ainsi, par exemple, lorsqu'à l'occasion de la demande en paiement d'une partie d'une dette s'élève une difficulté concernant la créance tout entière, la décision qui tranche cette difficulté a l'autorité de la chose jugée à l'égard de la partie de la dette dont le paiement n'a pas été primitivement demandé et donne lieu à des poursuites ultérieures. (Aubry et Rau, t. 8, p. 390, sec. 769, note 33; Larombière, art. 1351, n. 50.)

§ 260. Conformément à cette règle, la cour de cassation a décidé que, si une somme d'argent payable en plusieurs termes est due en vertu d'une même obligation, et qu'une difficulté soit soulevée au sujet de la validité de l'obligation, le jugement qui résout la difficulté, et ordonne le paiement d'un terme a sur ce point l'effet de la chose jugée relativement aux autres termes. (Cass., 20 dec. 1830, Thevenin. (S. 31. 1. 41, P. Chr.) Sic, Demolombe, loc. cit.—V. aussi Cass., 4 nov. 1863, Larbana, (S. 63. 1. 539, P. 64. 222, D. 64. 1. 38.)

Same authority, Title, Chose Jugée, No. 226, says that—

La règle d'après laquelle l'autorité de la chose jugée ne s'attache pas aux motifs doit être écartée lorsque les motifs font corps avec le dispositif, lorsque, selon l'expression de la cour de cassation, ils sont nécessaires pour soutenir le dispositif. (Cass., 28 juin 1869; Biteau. (S. 69. 1. 422, P. 69. 1091. D. 71. 1. 223.) Sic Boumer, N. 863. Laurent, t. 20. n. 30; Demolombe, t. 30, n. 29; Garsonnet, t. 3. p. 239 et 240, sec. 465. texte et note. 15.—V. aussi Cardot, Revue critique de leg. et de juris. 1863, p. 452.)

No. 227: Souvent en effet le dispositif ne contient qu'une partie de ce que le juge a décidé et l'autre partie se trouve dans les motifs. C'est ce qui se produit notamment lorsque le juge doit statuer successivement sur deux points et que la solution donnée pour le second est la conséquence nécessaire de celle qui est donnée pour le premier; le juge met la première solution dans les motifs sous forme de considérant, et le dispositif ne renferme que la seconde. Ainsi, au cas où le demandeur se prétend d'être le fils de telle personne décédée, et réclame à ce titre la succession, il peut se faire que le tribunal ne constate la filiation contestée que dans les motifs, et que le dispositif ne contienne simplement que l'attribution de l'hérédité. Il est manifeste que, dans les hypothèses de ce genre, l'autorité de la chose jugée ne doit pas s'attacher uniquement au dispositif; le jugement contient, en réalité, deux décisions, l'une renfermée dans le dispositif, l'autre insérée dans les motifs. (V. Trib. Castel-Sarrazen, 22 juin 1850, Nougaroles, S. 50. 2. 417.)

Bearing in mind the fact that Mexico distinctly contended that the Pious Fund was simply an arm of the Government and not a religious institution, and furthermore denied that the properties of the Pious Fund were as extensive as they were said to be by the claimants, we feel that all of the decisions to which reference has been given are directly in point. The issues above referred to having been clearly raised, having been the subject of evidence and discussion on the part of both parties, being at the same time germane and in fact essential to a proper determination of the claim under the memorial, and the court having finally adjudicated upon the subject, nothing remains to prevent the old adjudication from being to the fullest extent *res judicata*, or forbids that there should flow from that decision the consequences claimed by the United States.

THE DOCTRINE OF OVERRULED CASES.

Sr. Mariscal adduces in his letter of November 28, 1900, to Mr. Powell Clayton (Diplomatic Correspondence, p. 31) the existence of overruled cases in our common-law courts as proof that the rule of *res judicata* is not always adhered to in them. He has been led into this error by losing sight of the inherent and essential distinction between the rule of *res judicata* and the maxim *stare decisis*. When a doubtful or disputed principle of law has been decided by a court of last resort men adopt it as a guide in their future transactions, and hence justice and public policy demand adherence to it when the same question of law is again presented. This is briefly expressed by the maxim *stare decisis*. It applies exclusively to questions of law; and if, as sometimes occurs, the same court afterwards concludes that it erred in its appreciation of the law it reconsiders the doctrine previously announced and *overrules* its former opinion; such cases are called "*overruled cases*." They are overruled as authoritative expositions of the law

~~That case may be res judicata though law
subsequently rejected - see p 81, Chomda Beachie
The Individa.~~

" The Spanish Board (located in Mexico) ordered April 30, 1972 that the moneys taken from the Pious Fund should be "especially employed for the worthy purpose for which they were created, according to the intentions of the endowments" Tr. p. 428.

because the court is convinced that it erred in law in pronouncing them.

The doctrine of *res judicata*, on the other hand, ^{also} applies ^{only} to facts ^{judicially} ~~judicially~~ ^{ascertained}; where ~~disputed facts~~ ^{facts} are once determined by ^{the} ~~the~~ final judgment of a court of competent jurisdiction such judgment ^{is always, everywhere, and forever conclusive as to such facts,} ~~is always, everywhere, and forever conclusive as to such facts,~~ ^{between the same parties and those claiming in privity with them.} To this rule there is ^{absolutely no exception.} ~~With this distinction in mind~~ Sr. Mariscal will recognize his misapplication of the suggestion of overruled cases.

CONSIDERATIONS WITH RELATION TO THE MERITS OF THE CLAIM.

It is not our intention to argue at any length the details affecting the merits of the claim for the Pious fund. The United States relies absolutely, and, as we believe, with entire justice, upon the fact that these merits have once been the subject of consideration and examination by an entirely competent tribunal, and that tribunal having passed thereon, the American Government is relieved from any necessity for detailed discussion. Even if this were not the correct view, we would be excused from entering upon the consideration of the merits as an independent proposition, because this branch of the subject has been so thoroughly treated by the Messrs. Doyle, counsel for the bishops of California, who have shown that a reexamination of the merits would bring about as its necessary result a judgment against Mexico considerably larger than that formerly awarded.

Notwithstanding the foregoing, and as bearing upon the justice of the contentions made on behalf of the United States, there are two or three features of the case to which we believe we are justified in inviting attention, and the first of these is that—

THE PIOUS FUND WAS AT ALL TIMES CONSIDERED AS RELIGIOUS IN CHARACTER, AND ITS BENEFICIAL OWNERSHIP VESTED IN THE CHURCH AUTHORITIES.

We need not do more than advert to the origin of this fund, springing, as it did, out of the pious desires of religious Catholics for the conversion of the heathen of the Californias to the truths of Christianity. While the fund remained under the control of the Jesuits these objects were faithfully promoted. When the Jesuits were removed, and for the default of other trustees the Spanish Government assumed control, its first act was (July 12, 1772) to carry out the desires of the founders, for the King's order (Transcript, p. 456) declared that he had assumed "all the rights of patronage which belonged to the regulars of the said order and also those which they might possess in common with those other orders, *without prejudice to these being devoted to the same purposes which they were before the time of the expulsion.*"

When the Spaniards were expelled from Mexico the Mexican Government followed the same policy. We find that the law of May 25, 1832, already cited at large in this brief, provides the manner in which the Government shall lease the rural property belonging to the Pious Fund, and that (sec. 6) "the proceeds of such property shall be deposited in the mint of the Federal City, to be wholly and exclusively destined for the missions of the Californias." It was further particularly directed that the board of management, consisting of three persons, should include an ecclesiastic. Among its powers were:

9. To name to the Government the amounts which may be remitted to each one of the Californias in accordance with their respective expenses and their available funds.

When, later on, the bishopric of California was created, article 6 of the law of September 19, 1836, provided:

The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the fund.

When still later, and on February 8, 1842, the Mexican Government reassumed the management of the Pious Fund, it particularly declared that the proceeds of the property assumed should be disbursed "in such way and manner as it shall direct for the purpose of carrying out the intention of the donor in the civilization and conversion of the savages."

Even when the fund was finally incorporated in the national treasury, the Government, by the decree of October 24, 1842, after insuring the payment of its revenues, declared that "the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise."

At the still later period, April 3, 1845, when the Government undertook to retrace its steps, it recognized the interest of the bishops in the subject-matter, for it provided:

All debts due to and other property belonging to the Pious Fund of the Californias which may be still unsold shall be forthwith restored to the right reverend bishop of that see, and to his successors, for the purpose stated in the sixth article of the law of the 19th of September, 1836, without prejudice to the action which Congress may take with regard to such as may have been sold.

It is therefore too late to be argued, as it was before the former Mixed Commission, that the purposes of the Pious Fund were political, or that the Pious Fund constituted an arm of the Government as distinguished from an assistance in the performance of a religious function.

Mexico assumed obligation for money loaned from
Fund by Mexico.

P. 124. Transcript shows \$201,856 with back interest
from 1804 paid to Spain by Mexico on acct. Philippine
Missions. The claim interest from 1812 on the amount.
This also shows capitalization of interest.

Report Secy. of Int. and Foreign Affairs, Tr. p. 220 & 221,
shows in 1827 substantially all claimed by Ramsey in 1842
due by Mexico, including Spanish taxes.

Passing, therefore, from this subject, we desire to add something to the view presented by Mr. Doyle with relation to

THE OBLIGATION RESTING UPON MEXICO TO PAY INTEREST UPON PRINCIPAL AND INTEREST OF ITS OLD INDEBTEDNESS TO THE PIOUS FUND.

It appears from an examination of the various statements with relation to the properties of the Pious Fund, referred to in the foregoing Statement of Facts, and more at large set forth in the places in the record pointed out by the index, that at the time of incorporation of this fund into the Treasury Mexico owed to the Pious Fund on account of principal \$539,872.25, and on account of interest upon various items embraced in the foregoing sum total the additional amount of \$564,968.54.

It was argued on behalf of Mexico before the Mixed Commission, and we presume the argument will be renewed, that Mexico should not have been charged with the principal of the above amounts, because they constituted merely an original indebtedness against the Government of such character that a mixed tribunal could not give it any special precedence over other obligations owned by other bonded or money creditors of the Government. It was contended, furthermore, that for a like reason any claim based upon interest must fail, as well as for the further reason that a claim upon such interest would amount to the compounding of interest upon a debt due by Mexico.

From our point of view, even if the matter were otherwise debatable, the foregoing contentions may not be sustained. The Messrs. Doyle have pointed out that they are not sustainable, for the reason that Mexico constituted herself a trustee by virtue of her assumption of the Pious Fund properties. We believe this position to be absolutely unassailable, but we desire to add certain other considerations.

The language of the decree of October 24, 1842, deserves careful analysis. This decree, after reciting that the decree of February was "intended to fulfill most faithfully the beneficent and national objects designed by the foundress, *without the slightest diminution* of the properties destined to the end; and whereas the result can only be attained *by capitalizing the funds and placing them at interest on proper securities*," etc., first incorporates into the national treasury "the real estate, urban and rural, the debits and credits, and all other property belonging to the Pious Fund of the Californias." In our view, the purpose of this law was to cover the entire subject-matter, to absolutely wipe out the Pious Fund in its then existing form, and to start upon a fresh basis. From and after its passage there was not a Pious Fund consisting in part of certain indebtedness of the Government, with interest thereon, but there was, to all intents and purposes, a refunding of everything, and in the place of an aggregate of about \$1,100,000, principal and interest, based upon the debt of the Treasury, we were pre-

sented with a new principal of a like amount (excluding from our present calculation the real estate and other properties). The debits due by the Government, being incorporated in the Treasury, could no longer exist in their ancient form, and the only form they could assume was that of a new obligation to pay \$1,100,000.

But what was the nature of this obligation? Was it to deliver over the principal of \$1,100,000, or was it to pay interest thereon perpetually? The question is answered; as we believe, from a consideration of the following sections of the act.

The second section, referring to the real estate and other property belonging to the Pious Fund of the Californias, directs its sale and acknowledges an indebtedness of 6 per centum per annum on the total proceeds of sale, the lands being capitalized at that rate. This section refers, we take it, to the real estate and other property capable of sale and not to the debts due by the Government, which, being incorporated into the treasury, became incapable of disposition.

The third section, however, refers to the whole subject-matter. The "revenue from tobacco," it says, "is specially pledged for the payment of the income, corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined," etc.

To what was the revenue from tobacco pledged? Not simply, we think, to the payment of moneys arising from the sale of real estate, but to the payment of moneys which ought to be paid because of the possession by the Government of all the properties belonging to the Pious Fund of the Californias which were incorporated into the national treasury.

The Government at the time this act was passed was fully acquainted with all the properties owned by the Pious Fund. Had its own records been deficient, its attention but eight months previously had been directed to the fact that the Pious Fund largely consisted of national obligations, and we are not, therefore, permitted to believe that the Government legislated in ignorance or that it only legislated over a part of the subject-matter, for the decree of October, 1842, recites that the prior decree "was intended to fulfill most faithfully the beneficent and national objects designed by the foundress, without the slightest diminution of the properties destined to the end."

But what rate of interest should be paid because of the absorption by the Government of its own debts and interest thereon? Surely the interest which was provided to be paid by section 2 was taken by the Government itself as a true measure of the advantage to be gained by it from the personal possession and extinction of the claim due by it to the Pious Fund. We have, therefore, in our opinion, the spectacle of the readjustment and recapitalization of the entire Pious Fund.

P. 24 Transcript shows capitalization of principal and
interest and interest thereafter on both for benefit of
Philippine Missions

If this view were not correct, what position would we be obliged to take? It would be, we submit, that while Mexico was willing to sell for its own temporary advantage and obtain the money from certain landed properties and to charge itself with interest thereon, it designed at the same moment to possess itself of all of the fund due by it to the Pious Fund of the Californias, without rendering an equivalent, a supposition so offensive to the good name and credit of Mexico that we are by no means disposed to make it.

The view which we entertain is, as we believe, sustained by the language of the decree of April 3, 1845, which provided for the restoration "of all the debts due to and other property belonging to the Pious Fund of the Californias which may be still unsold."

The tangible property of the fund may well have been sold. The debts due the fund by individuals may likewise have been sold, but it is not conceivable that the debts due by Mexico to the Pious Fund could have been disposed of. When a man buys a debt due by himself, while he may create a new obligation of a like amount, the old debt no longer has an existence. Mexico, therefore, even after the passage of the law of April, 1845, had she restored the tangible property yet remaining in her hands and in other respects carried out the purposes of that law, would still be obliged to account for interest upon the remainder of the fund sequestered to her uses.

We do not ignore the fact that upon the former hearings the representatives of Mexico insisted that it was out of the question that Mexico should have charged herself with 6 per cent interest upon the entire principal and interest due by her, when she was only obligated under the terms of the loans made to her to pay, for the most part, a lesser rate. The suggestion, as it occurs to us, is without legal force. The possession of hundreds of thousands of dollars of property, which could immediately be turned into ready money, constituted sufficient legal consideration for an undertaking to pay an advanced rate upon other moneys fairly due by her, or to pay interest where before none might properly have been chargeable. And the argument from a moral point of view is equally efficacious, for surely if the proper administrators of the Pious Fund were first to be deprived of the opportunity of administering property originally in their possession, and next, without consultation with them, that same property was to be converted into cash, and they were to be compelled to accept the promise of a government, then of uncertain stability, nothing could be more proper than that this changed position should be compensated for by a certain though advanced interest. The same remark holds good as to the securities of private individuals drawing a rate of interest less than 6 per cent. It may well have been that obligations of this nature could have been sold by Mexico for a larger sum than her own obligations would bring, and gaining as she might have done in immediate



(c) Mexico waived her right to object to the jurisdiction of the Mixed Commission by entering upon the trial of the former case without reservation.

(d) Mexico further waived any right to object to jurisdiction by signing new conventions, extending the old, while the Pious Fund case was still pending and undetermined, Mexico not withdrawing the case from the commissioners or umpire, and therefore confessing jurisdiction; all of which will more readily appear by reference to the dates of the several supplementary conventions and the position of the Pious Fund case at the time of their signing or ratification.

(e) The doctrine of *res judicata* applies to arbitral decisions and to the findings of international commissions.

(f) There was no error in the former proceedings of any kind, much less one affecting the jurisdiction of the Mixed Commission, which fact was recognized by Mexico, no allegation of error having been made even after the award had been reached.

(g) The former award, being *res judicata* of the matters in issue before the Mixed Commission, determines directly the amount of annual interest due by Mexico, according to the decisions of both common-law and civil-law courts.

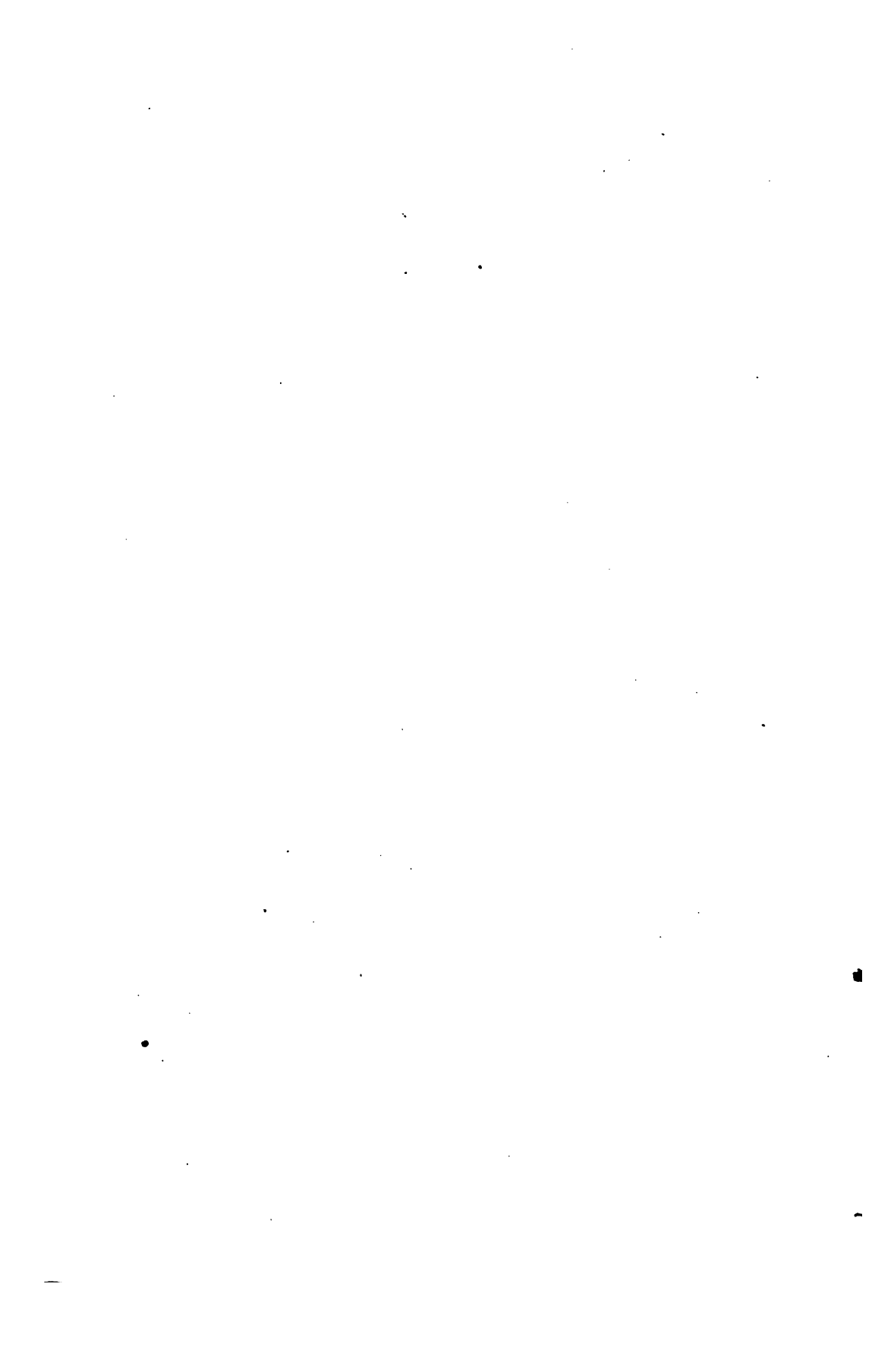
WITH RESPECT TO THE MERITS.

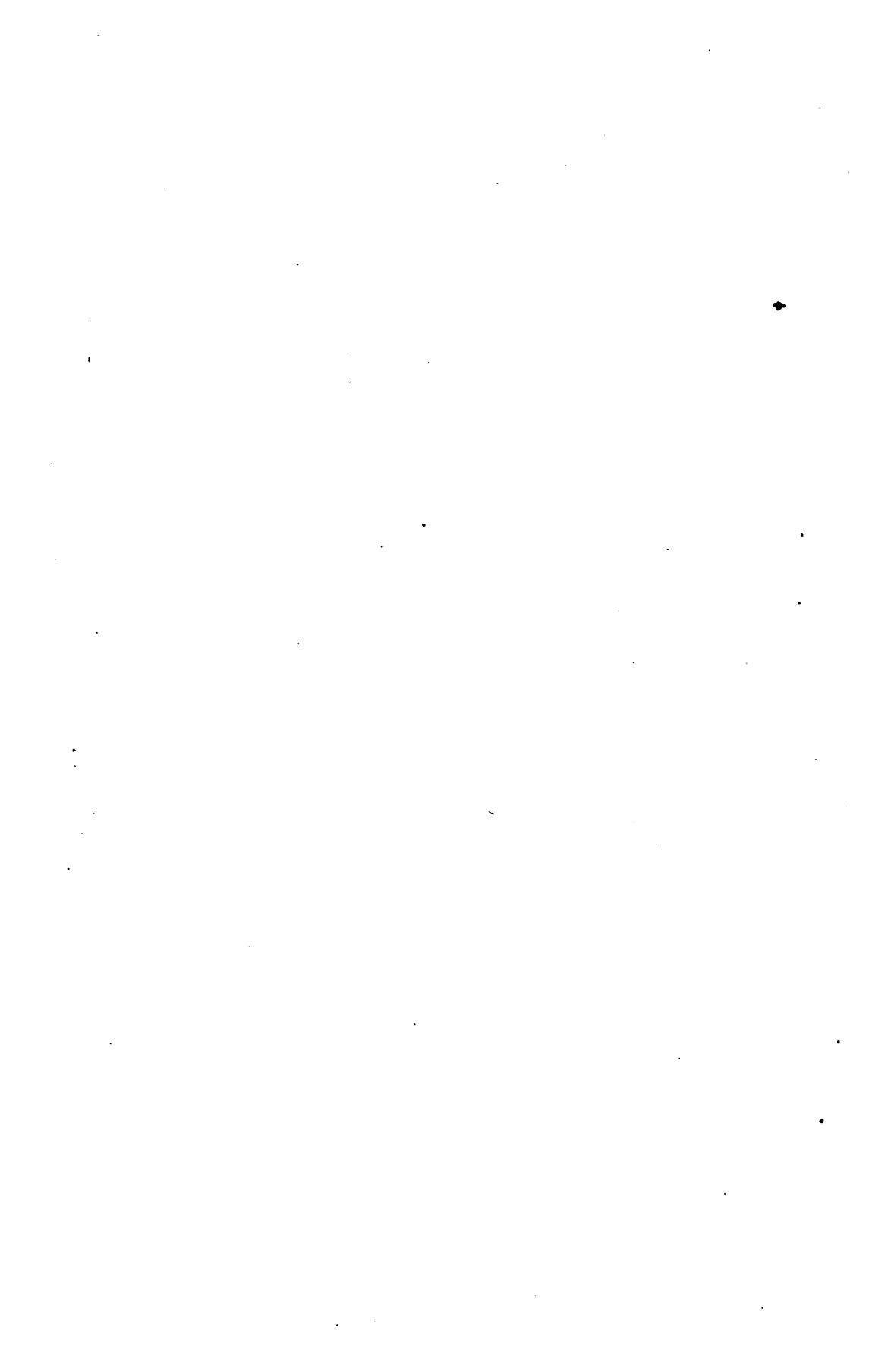
1. The Pious Fund was at all times considered as religious in its character and its beneficial ownership vested in the church.

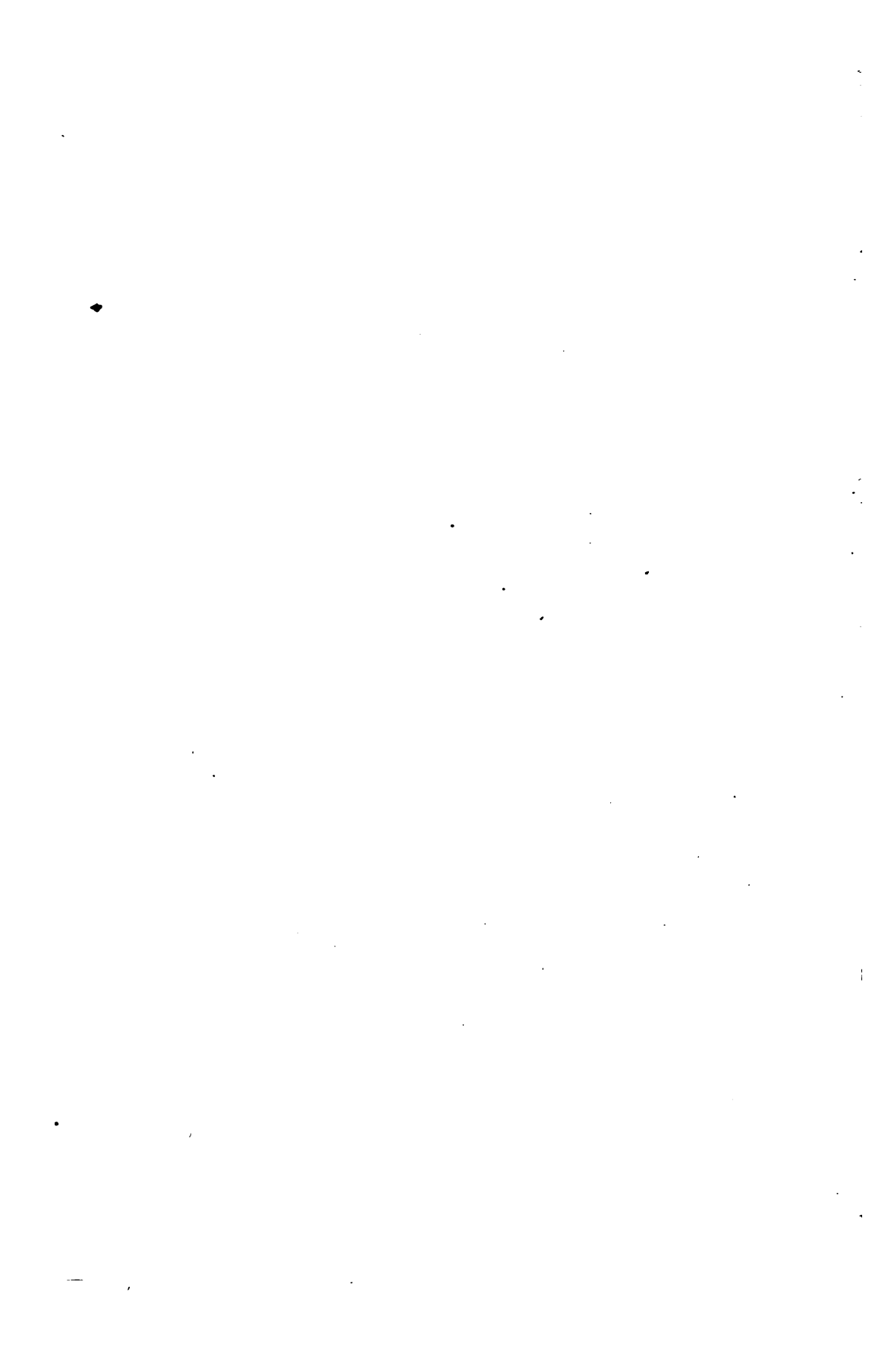
2. Mexico is under moral and legal obligation to pay interest upon both principal and interest of all of the property taken by her from the bishop of California, and if this case be decided upon the merits her obligation is larger than it was before adjudicated to be.

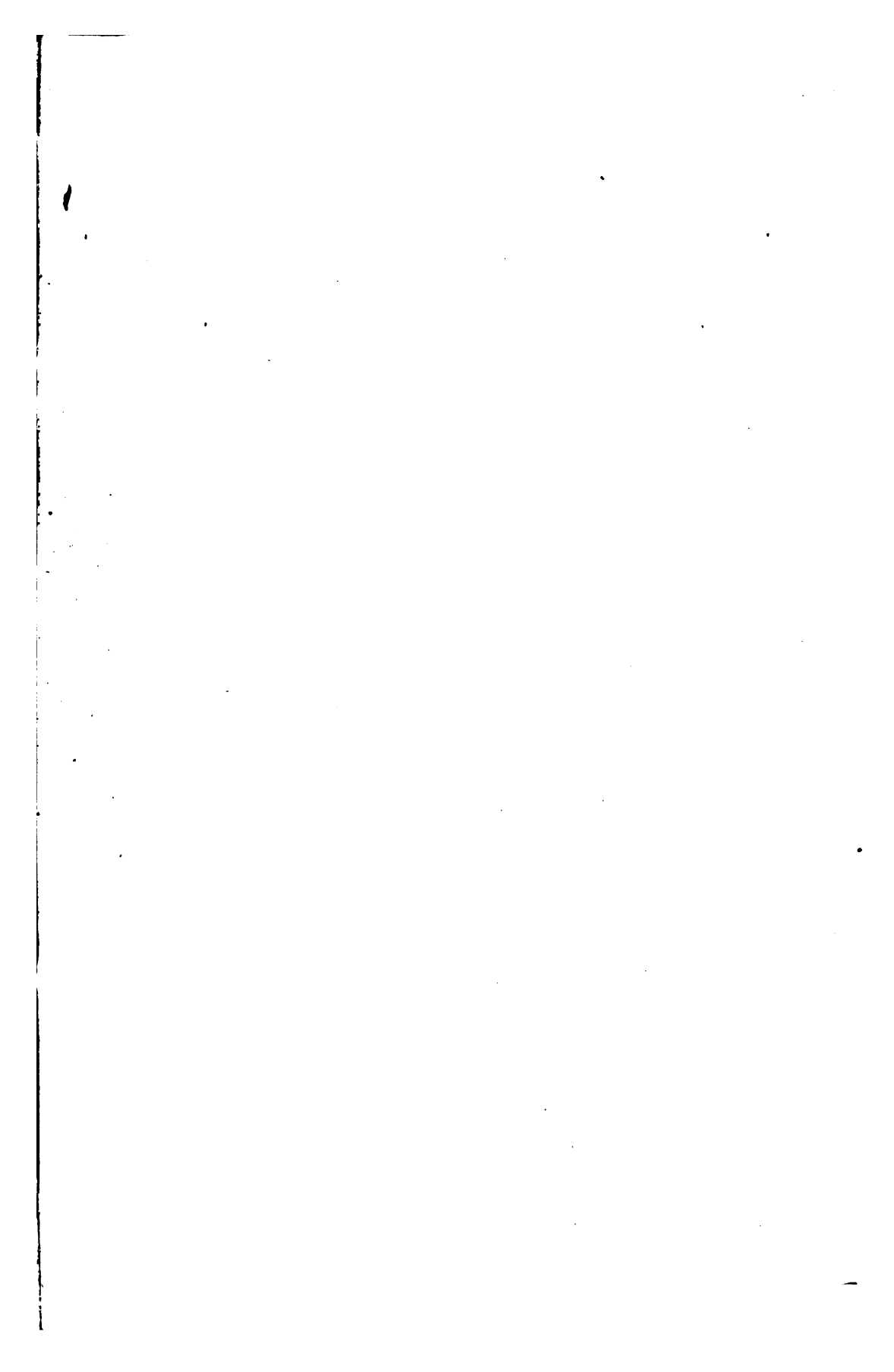
Respectfully submitted.

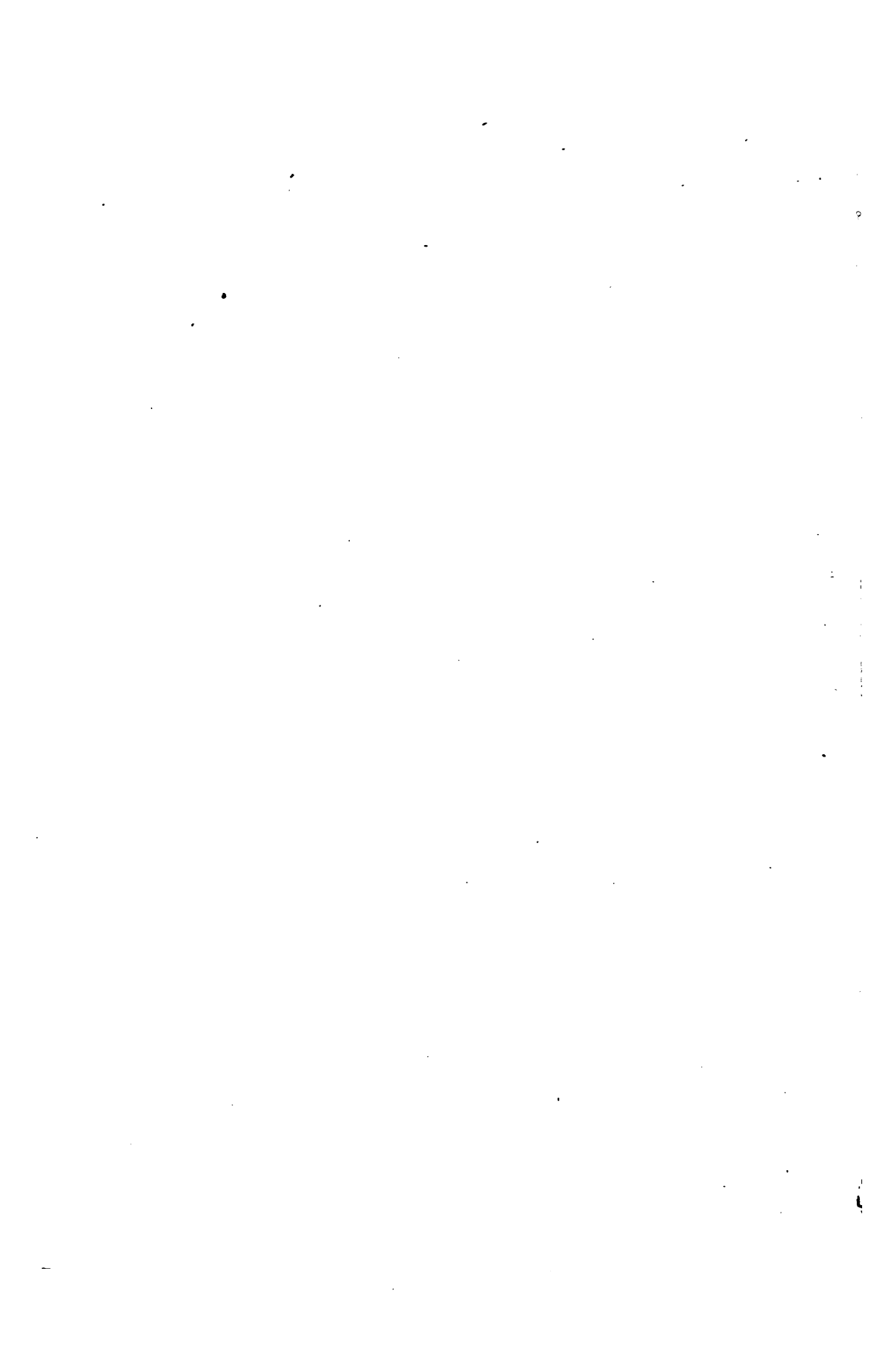
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<i>of America.</i>	<i>States of America, and of Counsel.</i>











In what document is account dated April 7. 1842,
on p. 221, Tr., the found?



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The case of the Pious Fund of
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